82-1541

NO.

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

M/V BIG SAM, in rem and
ZITO TOWING, INC.

Petitioners

VS

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REUTER & REUTER
ARTHUR C. REUTER, SR.
NORMAND F. PIZZA
303 S. BROAD
P.O. BOX 19567
NEW ORLEANS, LA 70179
(504) 822-9748

ATTORNEY FOR
PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Does the FWPCA, 33 USC § 1321 (f)(g)(h), preempt the United States government's right to sue for clean-up costs expended to clean an oil spill in navigable waters of the United States under a maritime tort cause of action.

2. Does the United States have standing to sue for damages caused to a waterway within the United States when the claim is founded on a maritime tort and the damages are for oil spill clean-up costs.

LIST OF PARTIES

United States of America
Thomas W. Snook
U.S. Department of Justice
Washington, D.C. 20530

and

John Volz
U.S. Attorney
500 Camp Street
New Orleans, LA 70130

Mission Insurance Company
Thomas Wagner
1300 Hibernia Bank Building
New Orleans, LA 70112

Solicitor General
Department of Justice
Washington, D.C. 20530

TABLE OF CONTENTS

Questions Presented for Review i
List of Parties ii
Table of Contents iii
Table of Authorities iv
Opinions Below 1
Jurisdiction 2
Statute Involved 2
Statement of the Case 2
Argument 5
Introduction 5
Conclusion 24
Certificate of Service 25
Appendix A ..... Vol. I, A-1
Appendix B ..... Vol. I, A-4
Appendix C ..... Vol. I, A-30
Appendix D ..... Vol. I, A-48
Appendix E ..... Vol. I, A-70
Appendix F ..... Vol. I, A-74

TABLE OF AUTHORITIES

CASE **PAGE**

Milwaukee VS Illinois,
451 US 304, 68 L.Ed.2d 114,
101 S.Ct. 1784 ..... 6, 9, 12, 13

Middlesex County Sewerage Authority VS Sea Clammers,
453 US 1, 69 L.Ed.2d 435,
101 S.Ct. 2615 ..... 6, 9, 12, 13, 17

Matter of Oswego Barge Corporation,
664 F.2d 327 (2nd Cir., 1981) 6

U.S. VS Dixie Carriers, Inc.,
627 F.2d 736 (5th Cir., 1980) 7, 15

Cushing VS Maryland Casualty Company,
198 F.2d 536 (5th Cir., 1952) 8

California VS SS Bournemouth,
307 F.Supp. 922 (C.D. CA. 1969) 11

The Daniel Ball,
10 Well 557 11

Wilson VS The Black Bird Creek Marsh Company,
2 Pet 245 (1829) 11

Gilman VS Philadelphia,
3 Wall 713 (1865) 11

Escanaba Company VS Chicago,
107 US 678 (1882) 11

Cardwell VS American Bridge Company,
113 US 205 (1884) 11

Hamilton VS Vicksburg, Shreveport and Pacific Railroad,
119 US 280 (1886) 11

Willamette Iron Bridge Company VS Hatch,
31 L.Ed. 629 (1887) 11

Erie Railroad Company VS Tompkins,
304 US 64 (1938) 11, 12

Hinderlinder VS LaPata Company,
304 US 92, 83 L.Ed. 1202, 58 S.Ct. 803 12

Illinois VS City of Milwaukee,
406 US 91, 31 L.Ed.2d 712, 92 S.Ct. 1385 12

Halcyon Lines VS Haenn Ship Ceiling & Refitting, Company, 342 US 282, 72 S.Ct. 277, 96 L.Ed. 318(1952) 14

Atlantic Coast Line Railroad VS Erie Lackawanna Railroad, 406 US 340, 92 S.Ct. 1550, 32 L.Ed.2d 110 (1972) 14

Cooper Stevedoring Company VS Fritz Kopke Inc., 417 US 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974) 14

Mobil Oil Corporation VS Higginbotham, 436 US 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978) 14

TVA VS Hill, 57 L.Ed.2d 117, 98 S.Ct. 2279 15

Gulf Oil Corporation VS Copp Paving Company, 419 US 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974) 16

Transamerica Mortgage Advisors Inc. VS Lewis, 444 US 11 (1979) 17

Touche Ross & Company VS Redington, 442 US 560 (1979) 17

Koch VS U.S., 11 Howard 229 20

U.S. VS San Jacinto Tin Company, 125 US 273, 85 S.Ct. 850, 31 L.Ed. 747 20

U.S. VS Appalachain Electric Power Company, 311 US 712; 61 S.Ct. 568 (1940) 20, 21

U.S. VS Bethlehem Steel Corporation, 319 F.2d 512 (9th Cir., 1963) 20

Toomer VS Witsell, 334 US 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) 20

Gertleer VS Connecticut, 161 US 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896) 21

California Department of Fish & Game VS SS Bournemouth, 307 F.Supp. 922 (C.D. Calif. 1969) 21

State of Maryland, Department of Resources VS Amerda Hess Corporation, 350 F.Supp. 1060 (D.MD. 1972) 21

U.S. VS M/V BIG SAM, 454 F.Supp. 1144 (E.D.LA 1978) 4

U.S. VS M/V BIG SAM,
480 F.Supp. 290 (E.D.LA. 1979) 4
U.S. VS M/V BIG SAM,
505 F.Supp. 1029 (E.D.LA. 1981) 4
U.S. VS M/V BIG SAM,
681 F.2d 432 (5th Cir., 1982) 4
U.S. VS M/V BIG SAM,
693 F.2d 451 (5th Cir., 1982) 4

LEGAL PERIODICALS AND BOOKS

Damages, Charles E. McCormack 1935 19
"The Origins of the Action of Trespass" 33 Yale Law Journal 1924 19
9 Houston Law Review 668 23

LEGISLATIVE HISTORY

116 Congressional Record 9327-9328 March 25, 1970 ..... 5, 8
115 Congressional Record 28960 Oct. 7, 1969 8
U.S. Code Congressional & Administrative News, Volume 2, 91st Congress Second Session, 1970 at page 2702 22

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

M/V BIG SAM, in rem and
ZITO TOWING, INC.

Petitioners

VS

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

All of the opinions below are contained in the attached appendix to the petition for certiorari. Appendix B is the Fifth Circuit's decision in *United States VS M/V BIG SAM,* 681 F.2d 432, (5th Cir., 1982) the judgment from which review is sought from this court. Appendix C is the Fifth Circuit's denial of rehearing and rehearing en banc, published 693 F.2d 451 (5th Cir., 1982). Appendices D, E, and F are the District Courts' opinions in *United States VS M/V BIG SAM,* published at 454 F.Supp. 1144 (E.D. LA., 1978, 480 F.Supp. 290 (E.D. LA. 1979) and 505 F.Supp. 1029 (E.D. LA. 1981).

JURISDICTION

Jurisdiction in the District Court was founded upon 28 USC § 1331, as the case involved a claim by the United States to recover clean-up expenses under the Federal Water Pollution Control Act, 33 USC § 1251 *et seq.* The United States also asserted claims under the Rivers and Harbors Act of 1899, 33 USC § 407, as well as the General Maritime Law, 28 USC 1333.

The judgment of the Court of Appeals was entered on July 30, 1982, and a petition for rehearing and rehearing en banc was denied on December 13, 1982.

The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

STATUTE INVOLVED

The primary statutory provisions involved in this litigation are 33 USC § 1321 (f) (g) (h), which are set out in the attached appendix to petition as Appendix A, in the form the provisions took at the time of the oil spill in question.

STATEMENT OF THE CASE

This case arose on April 25, 1975 when the M/V BIG SAM collided with a barge. The barge was holed and spilled oil into the Mississippi River. The United States cleaned up the oil spill. The money and authorization for the clean-up came from only one source, the FWPCA, § USC § 1251-1376.

The third party vessel, M/V BIG SAM is owned by

Zito Towing, Inc. Zito bareboat chartered the vessel to TriCapt., Inc. a now defunct company. TriCapt., Inc. was found to be liable for the collision because the helmsman steering the M/V BIG SAM at the time of the collision was not properly licensed. In the collision case, in which the United States was not a party and clean-up not an issue, the M/V BIG SAM was held liable with TriCapt., its charterer, under the Admiralty Doctrine of Ship personification—in rem liability. The crew hired by TriCapt. was incompetent, therefore the M/V BIG SAM was found to be unseaworthy. Unseaworthiness was the cause of the collision, ergo BIG SAM was liable.

At the time of the collision and clean-up, the vessel was worth more than the cost of clean-up. Clean-up was approximately TWO HUNDRED SEVENTY EIGHT THOUSAND AND NO/100 ($278,000.00) DOLLARS and the M/V BIG SAM was worth about FOUR HUNDRED THOUSAND AND NO/100 ($400,000.00) DOLLARS. Under FWPCA limits 33 USC § 1321 (g) in effect at the time ($100.00 per gross ton), the 155 gross ton BIG SAM would have a maximum liability of FIFTEEN THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($15,550.00) DOLLARS.

Because the cost of clean-up exceeded the FWPCA limitations substantially, and because the principal defendant and cause of the spill, TriCapt., Inc. was defunct and without the insurance it claimed it had, the United States sued the M/V BIG SAM and its owner Zito Towing, Inc. for the full amount of the clean-up costs under several theories, including maritime tort.

The district court initially held that the government was not limited to the remedies provided by the FWPCA

and could recover as well under both the General Maritime Law and the Refuse Act, *United States VS M/V BIG SAM,* 454 F.Supp. 1144 (E.D.LA. 1978), See Appendix D. Subsequently, following the submission of additional memorandum by all parties, the district judge vacated the previous ruling and held that the government was limited to those remedies specified under the FWPCA. *United States VS M/V BIG SAM,* 480 F.Supp. 290 (E.D. LA. 1979) See Appendix E. Following this ruling, the parties submitted the case for decision on stipulated facts. The trial court entered judgment in the amount of FIFTEEN THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($15,550.00) DOLLARS, the FWPCA statutory limit in favor of the United States against TriCapt., Inc., the bareboat charterer and operator of the BIG SAM. All the claims were dismissed, and the government's in rem claim was disallowed. *United States VS M/V BIG SAM,* 505 F.Supp. 1029 (E.D. LA. 1981) See Appendix F.

The United States appealed and the United States Court of Appeals for the Fifth Circuit reversed the District Court disallowing the government's claim to recover costs in excess of the statutory limits under maritime tort. *United States VS M/V BIG SAM,* 681 F.2d 432 (5th Cir., 1982). See Appendix B. The Fifth Circuit affirmed the District Court's ruling that the government's claim under the Refuse Act was preempted by the FWPCA.

Petitions for rehearing and rehearing en banc were denied by the Fifth Circuit. *United States VS M/V BIG SAM,* 693 F.2d 451 (5th Cir., 1982). See Appendix C. Circuit Judges Gee, Brown, Rubin and Jolly dissented. Petitioner files its petition for writ of certiorari to review the Fifth Circuit's decision and to resolve the conflicts created by its construction of this important statute.

ARGUMENT

INTRODUCTION:

Each and every day hundreds of vessels traverse the Mississippi River carrying all kinds of cargoes. Some carry wheat, corn and other grains, some carry salt, and other minerals, some carry machinery and manufactured goods and some carry chemicals including petroleum. Each U.S. vessel, whether it be a small pushboat, workboat, large towboat, fleet tug, freighter, tanker or barge carrying or not carrying a cargo must be financially responsible in order to operate on the river. This means each owner or operator of a vessel must have insurance protecting him and the vessel against water pollution. 33 USC § 1321 (p), 46 CFR 542, *Financial Responsibility for Removal of Oil and Hazardous Substances.* This rule applies throughout the United States. In everyday work-a-day terms this means that you can not operate on the Mississippi or any U.S. waterway if you cannot afford to purchase oil pollution insurance.

When the FWPCA, 33 USC § 1251 eq seq. was being considered by Congress, "the oil pollution provisions were extremely difficult to resolve because they affected directly the Merchant Marine, concepts of admiralty law, the *American Insurance Market,* and *Overseas Insurance Market,* the balance of payments, international relations, the *economy, small business,* onshore and offshore oil facilities, research provisions, vessel inspection requirements, requirements that vessels will carry oil spill containment equipment as well as the predominate consideration of the protection of our ecology." 116 *Congressional Record* 9328 March 25, 1970.

The Supreme Court has examined the effect of the FWPCA on several occasions. In *Milwaukee VS Illinois*, 451 US 304, 68 L.Ed.2d 114, 101 S.Ct. 1784, the Court held that no federal common law remedy was available to Illinois to seek abatement of the nuisance caused by interstate water pollution because the field was preempted by the comprehensiveness of the FWPCA. In *Middlesex County Sewerage Authority VS Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615, the Court held that the underlying legal basis of the federal common law of nuisance claims was preempted by the FWPCA and that there was no implied private right of action under the FWPCA despite savings clauses.

The circuit courts have also examined the FWPCA. The U.S. argued before the Second Circuit that the FWPCA in 33 USC § 1321 (h) (2) preserved the government's rights against "any third party whose actions may in any way have caused or contributed" to an oil spill making it anomalous for Congress to preserve non-FWPCA remedies against third parties (maritime tort—vessels) if it (Congress) intended to abolish such remedies against discharging vessels. The U.S. claimed because of the anomaly that maritime tort theories could be used to support a claim for full recovery of clean-up costs—(no limitation), against a discharging vessel despite the provisions of 33 USC § 1321 (f). The Second Circuit rejected this argument in *Matter of Oswego Barge Corporation*, 664 F.2d 327 (2nd Cir., 1981). Relying in part upon this court's decisions in *Middlesex County, supra*, and *Milwaukee VS Illinois, supra*, it held:

> "Once Congress legislates comprehensively on the subject of government remedies for oil spill clean-up costs, the responsibility lies with Congress to spell out expressly what, if any, role

> remains for courts to fashion and apply non-statutory remedies the government is asserting in this case."

In a footnote the Court indicated it would probably rule the same way if presented with a third party vessel case like *The Big Sam,* 664 F.2d 327 (at 341, footnote 19). The Fifth Circuit appeared to agree with this rationale when it decided against the Government in *United States VS Dixie Carriers, Inc.,* 627 F.2d 736 (5th Cir., 1980).

However, by refusing to hear the petition for en banc consideration of *United States VS Big Sam,* the Fifth Circuit by default agreed with the Panel on the *Big Sam* that by reason of 1321 (h) and despite 1321 (g) the government may recover without limit against a third party sole cause vessel. The dissent from the refusal to grant rehearing composed of Judges Brown, Rubin, Gee and Jolly, commented on the refusal:

> "Thus we (the Fifth Circuit) decree, he (M/V BIG SAM, third party vessel) may be crushed, while an equal fault discharger is to be shielded."
>
> "(The) Court has slighted its en banc function by refusing to face and resolve a fundamental conflict in principle between its panels, to adopt the approach of the BIG SAM panel and limit or disapprove the reasoning of *Dixie Carriers,* or to consider the countervailing arguments for a construction of the Act consonant with our prior panel decision in *Dixie Carriers.* ...
>
> "So doing, it passes to an overburdened Supreme Court the task of relieving those within our jurisdiction from burdens of which it is probable

> the Congress meant to discharge them, *preserves a clear conflict in principle in our decisions,* and abdicates what I conceive to be its major function."

Not only does the decision in *United States VS M/V BIG SAM* create a conflict within the circuit and with other circuit courts, it also has a profound effect on shipping and insurance along the Mississippi River. In part, the reasons for liability limits in the FWPCA were to allow for insurability on the part of vessel owners and operators as required by Federal Regulations. 116 *Congressional Record,* 9327, March 25, 1970; 115 *Congressional Record,* 28960 October 7, 1969.

The Fifth Circuit considered its decision's affect on insurance cost and procurement. It said that the Limitation of Liability Act, 46 USC § 183 (a) protected vessel owners from potentially crushing liability and from an uninsurable risk. In so stating it ignored reality and its own decisions. The Fifth Circuit has addressed previously the question of insurance premiums as they apply in connection with the Limitation of Liability Act.

> "Regarding the matter of higher premiums, even if this question had not been implicitly disposed of by *Cushing (Cushing VS Maryland Casualty Company* 198 F.2d 536, 5th Cir., 1952), we would reject the contention to begin with, *since in the vast majority of cases limitation is denied for one reason or another, it may well be questioned how significantly the possibility of limitation figures into the actuarial computation of premiums.* Second, since the maritime industry quite often benefits from a full recovery of losses, the policy underlying the Limitation Act is perfectly compatable with spreading losses through higher

> premiums. For example, the interest of the maritime industry in the present case is best served by permitting Olympic to recover its entire loss from the sinking of its vessel; the better policy would seem to favor slightly higher premiums, if really necessary, in order to avoid instances of severe loss. And finally, we do not think that the Limitation Act was intended to limit the amount of premiums paid by vessel owners on insurance. Therefore, we hold, that the possibility of higher premiums is an insufficient basis for permitting an insurer to limit its liability."

In Louisiana and elsewhere, every insurer will have to react to the potential problem this case causes in connection with direct action statutes and the success of limiting liability in a pollution claim. The fact that a maritime tort claim is now permitted and that the United States may proceed against the insurer directly without benefit of limitation and further that should it have a benefit of limitation, the limitation will probably not be successful creates in the insurer sufficient doubt to cause him to raise his premiums significantly to cover the potentially crushing liability of an oil pollution claim. This problem is exactly what Congress considered in reaching the compromise of the Federal Water Pollution Control Act.

This Court is now presented squarely with an issue it did not have to decide in *Milwaukee VS Illinois, supra*, and *Middlesex County VS Sea Clammers, supra*. Specifically that is the preemptive effect of legislation, the FWPCA, upon maritime law. The Sea Clammers Association alleged a claim under federal common law of public nuisance and a claim of maritime tort. The Third Circuit held both claims to be viable, 616 F.2d 1222. The Supreme Court in a limited grant of certiorari, included as one of its questions,

"Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, is not preempted by" the FWPCA. 449 US 917, 101 S.Ct. 314, 66 L.Ed.2d 145 (1980). The grant of certiorari did not expressly include any question bearing upon the plaintiff's claim of maritime tort.

If this Court finds either that the FWPCA preempts a claim for maritime tort or that the United States is without standing to allege a claim for maritime tort, it will resolve all of the issues presented by 33 USC § 1321 (f) (g) and (h). No maritime tort or preemption of maritime tort means there is no maritime lien outside of a grant given in 33 USC § 1321 (f). There is no recovery for clean-up costs outside of the limits set in the FWPCA unless the spill is willful. The effect on insurance cost and procurement is predictable by the companies based upon the language and experience they have with the FWPCA. The questions left open by the Fifth Circuit in *United States VS M/V BIG SAM:*

> "1. Whether a maritime tort not subject to the limitation of liability because of the owner's knowledge of privity would be inconsistent with the remedy provided by the act for willful conduct or willful negligence and
>
> 2. Whether the maritime tort remedy provides a recovery that is cumulative to or concurrent with the remedy provided by subsection (g)"

are resolved.

THE FWPCA PREEMPTS THE RECOVERY BY THE UNITED STATES UNDER FEDERAL MARITIME TORT LAW FOR THE FULL AMOUNT OF ITS CLEAN-UP COSTS

No court nor commentator has ever cited a pre-FWPCA, pre-Oil Pollution Act of 1924, or pre-Rivers & Harbors Act of 1899 case as authority or illustration for the proposition that the United States is or can be the beneficiary as plaintiff of an award for damages resulting from oil pollution of a navigable waterway. The leading case and one most often cited recognizing the maritime tort of oil pollution is *California VS SS Bournemouth*, 307 F.Supp. 922, (C.D. CA., 1969). However, that case recognized California the state as a plaintiff, not the United States. The FWPCA and the case law developed to date all recognize the right of a state to sue for damages caused by oil pollution.

It is uncontested here, indeed it has long been recognized, that power is vested in the federal government to regulate and control the waters of the United States. *the Daniel Ball* 10 Wall 557. But until Congress acts on the subject, the power of the state over its waterways is plenary. *Wilson VS The Black Bird Creek Marsh Company*, 2 Pet. 245 (1829); *Gilman VS Philadelphia*, 3 Wall 713 (1865); *Escanaba Company VS Chicago*, 107 US 678 (1882); *Cardwell VS American Bridge Company*, 113 U.S. 205 (1884); *Hamilton VS Vicksburg, Shreveport and Pacific Railroad*, 119 US 280 (1886); *Willamette Iron Bridge Company VS Hatch*, 31 L.Ed. 629 (1887).

Until Congress does pass a law, "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. *No precedent however, exists for the enforcement of any such law...*" *Willamette Iron Bridge Company VS Hatch*, 31 L.Ed. 629, 632 (1887). *Erie Railroad VS Tompking*, 304 US 64 (1938) established again that there is no

federal general common law and "except in matters governed by the federal constitution or by Act of Congress, the laws to be applied in any case is the law of the State." *Erie Railroad VS Tompkins, supra.* The only exception recognized to this rule was made at the time *Erie Railroad VS Tompkins* was handed down. *Hinderlider VS LaPata Company,* 304 US 92, 110, 83 L.Ed. 1202, 1212, 58 S.Ct. 803, held that federal common law exists to resolve a dispute where the interstate nature of a controversy renders inappropriate the law of either state.

Illinois VS City of Milwaukee, 406 US 91, 31 L.Ed.2d 712, 92 S.Ct. 1385, did not change the rule handed down in *Hinderlider VS LaPata Company* or *Erie Railroad VS Tompkins.* The beginning of the opinion recognizes Milwaukee's right to be a party as a political subdivision of the State of Wisconsin. The issue of the case was the pollution of interstate waters with the litigants essentially being opposite states. Obviously neither Wisconsin's law nor Illinois' law would have been appropriate to follow for a decision by the U.S. Supreme Court. The court went on to say what has been stated countless times by the Supreme Court. Congress has the right to act and thereby preempt state law and federal common law.

> "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Illinois VS City of Milwaukee, supra,* at page 725, L.Ed.2d.

Later this court held that the FWPCA did in fact completely preempt the federal common law of nuisance for actions between states or their political subdivisions and for actions by private citizens. *Milwaukee VS Illinois,* 451 US 304, 68 L.Ed.2d 114, 101 S.Ct. 1784, and *Middlesex*

County Sewerage Authority VS Sea Clammers, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615.

> "The court has now held that the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the FWPCA..." *Milwaukee VS Illinois* and *Middlesex County Sewerage Authority VS Sea Clammers, supra.*

The Fifth Circuit now holds in *U.S. VS M/V BIG SAM* that the FWPCA did not preempt federal maritime law in one and only one case where a third party vessel causes an oil spill either jointly or by its sole fault. The conclusion of the court is wrong. The FWPCA does preempt recovery by the United States under federal maritime tort law.

The United States Supreme Court has been as reluctant to fashion maritime tort law as it has been to draw a body of general federal common law.

In 1952 the court declined to make a rule sanctioning contribution between joint tortfeasors in non-collision cases Justice Black said:

> "In the absence of legislation, courts exercising common law jurisdiction have generally held that they can not on their own initiative create an enforceable right of contribution as between join tortfeasors. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else...To some extent courts exercising jurisdiction in maritime affairs have felt freer than common law courts in

> fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should wait Congressional action." *Halcyon Lines VS Haenn Ship Ceiling and Refitting Corporation,* 342 US 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952).

In 1972 the court upheld *Halcyon* by a per curium decision in *Atlantic Coast Line Railroad VS Erie Lackawnna Railroad,* 406 US 340, 92 S.Ct. 1550, 32 L.Ed.2d 110 (1972). *Halcyon* was of course severely limited by the decision in *Cooper Stevedoring Company VS Fritz Kopke, Inc.,* 417 US 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974).

But the court's reluctance to make law absent Congressional act remains as strong as ever. Justice Rehnquist speaking for the majority in *Milwaukee VS Illinois* discussed this principal by referring to the court's holding in *Mobil Oil Corporation VS Higginbotham,* 436 US 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978):

> "In *Mobil Oil Corporation VS Higginbotham,* the court refused to provide damages for 'loss of society' under the general maritime law when Congress had not provided such damages in The Death On The High Seas Act:
>
> 'We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death On The High Seas Act, announces Congress' considered judgment on such issues as the

> beneficiaries, the limitations, contribution negligence, survival and damages...The act does not address every issue of wrongful-death law,...but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the act becomes meaningless.' At 625, 56 L.Ed.2d 581, 98 S.Ct. 2010.
>
> 'Thus the question was whether the legislative scheme 'spoke directly to a question'—in that case—the question of damages —not whether Congress had affirmatively proscribed the use of federal common law.
>
> Our committment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with common sense and the public weal' when Congress has addressed the problem. *TVA VS Hill*, 57 L.Ed.2d 117, 98 S.Ct. 2279"

The Fifth Circuit in *United States VS M/V BIG SAM* maintains that 1321 (h) (2) preserves the maritime tort remedy for the United States. The dissent to the denial of rehearing en banc addresses this issue by saying:

> "1. Our earlier *Dixie Carriers*' opinion concluded that, since Subsection (f)'s liability limitations apply in cases of simple negligence, the FWPCA preempts the general maritime tort remedy for such negligence. Though that decision concerned the liability of discharges, the decision of the *BIG SAM* panel that subsection (g)—textually and conceptually identical to and interlocking with subsection (f)—does not preempt the general maritime tort remedy for simple negligence of third party causes of discharges conflicts in

principle with *Dixie Carriers* and throws the general Congressional scheme into irrational disarray.

2. By focusing exclusively on the literal language of subsection (h) preserving the government's rights against third party causes, the panel opinion saps the limitation of liability provided them by subsection (g) of vitality and all but reads it out of the statute.

3. The *BIG SAM* panel adopts as to third party causes the approach of the original Senate bill—unlimited recovery for simple negligence—that was squarely rejected by the Congress. Such an adoption of a rejected approach in the teeth of the legislative history conflicts with the strongest settled principles of statutory construction, both in this court and in the Supreme Court. See *EG Gulf Oil Corporation VS Coppe Paving Company*, 419 US 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

33 USC § 1321 (g) states in part:

"In any case where an owner or operator of a vessel...from which oil...is discharged in violation...of this section proves that such discharge of oil...was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an Act of God, an Act of War, or negligence on the part of the United States government, such third party shall, notwithstanding any other provision of law, be liable to the United States government for the actual costs incurred under Subsection (c) for removal of such oil or substance by the United States government, except *where such third party can prove that such a discharge was caused solely by (a) an Act of God, (b) an Act of War, (c) negligence on the part of the United States*

> *government, or (d) an act or omission of another party without regard to whether such act or omission was or was not negligent or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which causes the discharge of oil...the liability of such third party under this subsection shall not exceed $100.00 per gross ton of such vessel or $14 million, whichever is the lesser....If the United States can show that the discharge of oil...was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.*

Compare this language with that of 33 USC § 1321 (h) (2):

> "The liabilities established by this section shall in no way affect any rights which the United States government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance."

It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. *Middlesex County Sewerage Authority VS Sea Clammers, supra,* and *Transamerica Mortgage Advisors, Inc. VS Lewis,* 444 US 11, (1979), *Touche Ross & Company VS Redington,* 442 US 560 (1979).

33 USC § 1321 (g) very clearly sets forth the remedy of the United States where a third party non-discharging vessel causes an oil spill. Congress spoke directly to the

question presented by this case. The M/V BIG SAM falls squarely within the confines of the language. But by reading the more broad provision of 1321 (h) (2), the Fifth Circuit has torpedoed the limitations provided by the FWPCA, floating its decision on a theory of maritime tort recovery for the United States. In so doing, it has ignored the language of this court and the decisions cited above and has in essence completely read out section 1321 (g) of the FWPCA. No thinking person can state honestly that by following the Fifth Circuit's opinion in *United States VS M/V BIG SAM,* 33 USC § 1321 (g) remains viable.

THE UNITED STATES DOES NOT HAVE STANDING TO ALLEGE A CLAIM TO RECOVER ITS CLEAN-UP COSTS BASED ON A THEORY OF MARITIME TORT

Prior to the FWPCA and other federal legislation, the United States did not try to recover clean-up costs. Prior to the FWPCA the United States did not clean the water. After the FWPCA was passed, the United States began clean-up. Now it would like to clean-up the water and recover its expenses in a manner not prescribed by Congress in the act but rather by maritime tort. So far, only the Fifth Circuit has permitted this and only in this third party non-discharging vessel case.

The actions through which most of the modern law of damages was evolved was the action of trespass, with its late progeny case and *Assumpsit.* The parentage of an action in trespass was devised in 1166 upon a Roman model as a remedy against one who had violently wrestled possession of land from another. Shortly after this action called the "assise of novel disseisin", came into use, the practice arose of giving judgment in such cases, not only for the

restoration of the land, but for damages assessed by the jury for the loss of crops and goods taken from the land by the marauder. This incidental relief of damages, like the other features of the action was a borrowing from the practice found in the Roman proceedings upon which the action was modeled. *Damages*, Charles E. McCormack, 1935; George E. Woodvine, "*The Origins of the Action of Trespass*", 33 Yale Law Journal 1924.

The action of trespass is designed to protect the interests and exclusive possession of the land in its intact physical condition. Therefore, any person in the actual and exclusvie possession of the property may maintain the action although he has no legal title. The element of possession is so important in the action of trespass that an owner who is out of possession can not maintain a trespass action.

The idea of possession and the necessity of being in possession is still in the modern thoery of trespass. The American Law Institute Restatement of Torts Second, 1966, states that a trespass on land subjects the trespasser to liability from physical harm to the possessor of the land at the time of the trespass or to the land or his things.

The law framing the guidelines of general maritime tort arose out of the action of trespass and has its same requirements of possession or ownership and damages. (See Benedict on Admiralty.)

The United States may not bring a general maritime tort action against the M/V BIG SAM. The United States lacks the essential elements of a maritime tort. The United States neither owns nor possesses the Mississippi River.

The United States as a proprietor has the same rights which a citizen has to bring the conventional action for protection of its proprietary rights. In *Koch VS United States*, 11 Howard 229, 13 L.Ed. 675, the Supreme Court held that the United States could, without any statute authorizing a suit, sue in trespass for the taking of timber from its land. In *United States VS San Jacinto Tin Company*, 125 US 273, 8 S.Ct. 850, 31 L.Ed. 747, the Supreme Court held that the United States could sue in equity to set aside a patent of United States land which patent had been obtained by fraud. However, the United States does not own nor possess the Mississippi River. *United States VS Appalachain Electric Company*, 311 US 712; 61 S.Ct. 548 (1940). The Mississippi River is a navigable waterway and the flow of a navigable waterway is not capable of possession or ownership. The government's interest in the navigability of such waterways arises out of the constitutional power of Congress to regulate interstate and foreign commerce. Therefore, the government's interest is a regulatory interest and not a proprietary interest. *United States VS Bethlehem Steel Corporation*, 319 F.2d 512 (9th Cir., 1963).

The State of Louisiana as the owner of the riverbed banks and marine life is the proper party to bring a general maritime tort action against the M/V BIG SAM. Justice Frankfurter, concurring in *Toomer VS Witsell*, 334 US 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) stated,

> "A state should care for its own in utilizing the bounties of nature within her borders because it has the technical ownership of such bounties or, when ownership is in no one, because the state may for the common good, exercise all the authority that technical ownership ordinarily confers."

It is just this "technical ownership" that the State of Louisiana has in its waters that gives it the legal right to bring suit on behalf of the public in order to serve the common good of its citizens. If the State is deemed to be the trustee of its waters, then as trustee, the State is the one empowered to bring a general maritime tort actiongainst pollutors of those waters to protect the corpus of the trust, i.e. the waters, for the benefits of the trust, i.e. the public.

The State of Louisiana is the proper authority to bring the general maritime tort action. The State has the right to preserve its natural resources because of the existence of a state police power. *Gerteer VS Connecticut*, 161 US 519, 16 S.Ct. 600, 40 L.Ed. 793, (1896).

The federal courts have recognized that because the states have the element of possession or ownership that they are the proper parties to bring a maritime tort action to recover damages caused by an oil spill in navigable waters. *California Department of Fish and Game VS SS Bournemouth*, 307 F.Supp. 922 (C.D. Cal. 1969). The court stated that because California possessed the requirement of ownership and damage, the general maritime law provided relief to that owner for the property tortiously damaged by conversion. The same is true in *State of Maryland Department of Resources VS Amerada Hess Corporation*, 350 F.Supp. 1060 (D.MD. 1972).

The prosecuting of a general maritime tort action by the United States government is an invasion of the sovereignty of the State of Louisiana and in the absence of legislation by Congress, a violation of the 10th Amendment. The Supreme Court specifically prohibited such an infringement in *United States VS Appalachain Electric Power Company, supra*, when it said:

> "Actions taken by the United States in the states which are valid under the commerce power cannot be an invasion of the sovereignty of the state in violation of the 10th Amendment under which non-delegated powers remain with the state."

If it is true as the United States maintains, that it has standing to bring this action in maritime tort, one must wonder why no action was taken by the United States to clean-up rivers prior to the legislation of the FWPCA. One must further question why actions under maritime tort were not brought prior to clean-up authorized by the FWPCA. Congress thought it was necessary in the act to provide for the establishment of a maritime lien on a vessel which might be recovered by an action in rem. Legislative History, Public Law 91-224, U.S. Code Congressional and Administrative News Volume 2, 91st Congress, Second Session, 1970, at page 2702. If the United States had standing to bring a maritime tort prior to the enactment of the FWPCA, creation of a maritime lien and an in rem action would not have been necessary. However, the House in its deliberation did believe that it was necessary. These provisions found their way into Section 1321 (f) when the final act was made.

This court is now presented with the opportunity to settle an issue which will continue to bedevil the court for the next several years. Congress tried to address the question of the ecology and the protection of business enterprise. The Fifth Circuit has muddied the waters. This court must decide whether or not the United States has standing to bring a maritime tort and if so whether or not the FWPCA has preempted the United States claim under a theory of maritime tort.

"Vessel owners and operators who can function without protection and indemnity or other liability insurance are few indeed. While all thinking persons want to minimize pollution by oil and hazardous substances, the imposition of liabilities and peanlties which can not be insured against, will not end the pollution by the few who can operate without insurance; it will simply end water transportation of needed products by the may who must have insurance to remain in business. Before imposing uninsurable liabilities and penalties, the question first examined should be whether the product carried on the water is one which the country can do without. 9 *Houston Law Review* 668 by Nicholas Healy.

Should this court refuse to grant certiorari, it will mean that the decision of the Fifth Circuit will stand. More particularly it will mean that the M/V BIG SAM will be seized and sold to pay the debt to the United States for the cost of clean-up. At the time of the collision which caused this spill the BIG SAM was bareboat chartered to TriCapt., Inc., a now defunct company. The vessel was found unseaworthy because TriCapt., Inc. placed on board a helmsman who was not licensed. The owners of BIG SAM did not select or participate in any way with the decision to place this man on board. Nevertheless, because of the personification of the vessel, the owners of the BIG SAM now face loss of their vessel. Additionally, the owners of the BIG SAM received certificates from TriCapt., Inc. indicating that water pollution insurance had been obtained. In truth and in fact, insurance was not obtained to protect the BIG SAM and its owners from the provisions of the FWPCA. If this court grants certiorari and decides that maritime tort does not apply for whatever reason, the owners of the M/V BIG SAM will not lose their vessel.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED:

REUTER & REUTER

REUTER & REUTER
ARTHUR C. REUTER, SR.
NORMAND F. PIZZA
303 S. BROAD
P.O. BOX 19567
NEW ORLEANS, LA 70179
(504) 822-9748

ATTORNEY FOR
PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been mailed to counsel of record for the involved parties, this 11th day of March, 1983.

REUTER & REUTER
A Professional Law Corporation

By _____

REUTER & REUTER
ARTHUR C. REUTER, SR.
NORMAND F. PIZZA
303 S. BROAD
P.O. BOX 19567
NEW ORLEANS, LA 70179
(504) 822-9748

ATTORNEY FOR
PETITIONER

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

82-1541
NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

M/V BIG SAM, in rem and
ZITO TOWING, INC.

Petitioners

VS

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT VOLUME I—APPENDICES "A-F"

REUTER & REUTER
ARTHUR C. REUTER, SR.
NORMAND F. PIZZA
303 S. BROAD
P.O. BOX 19567
NEW ORLEANS, LA 70179
(504) 822-9748

ATTORNEY FOR
PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

APPENDIX "A"

Statutory Provisions

33 U.S.C. §1321(f)(1)(1972)

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section shall, not withstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in any action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

33 U.S.C. §1321(g)(1972):

(g) In any case where an owner or operator of a

vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent

jurisdiction to recover such removal costs.

33 U.S.C. §1321(h)(1972):

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

APPENDIX "B"

UNITED STATES of America
Plaintiff-Appellant,

v.

M/V BIG SAM, in rem, et al.,
Defendants-Appellees.

No. 81-3127
United States Court of Appeals,
Fifth Circuit.

July 30, 1982.

Rehearing and Rehearing En Banc
Denied Dec. 13, 1982.

Wendy M. Keats, Leonard Schaitman, Attys., Civ. Div., Appellate Staff, Dept. of Justice, Thomas W. Snook, Allen Van Emmerick, Civ. Div., Torts Branch, Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Normand F. Pizza, New Orleans, La., for M/V BIG SAM and Zito Towing Co.

Thomas J. Wagner, Richard A. Sabalot, New Orleans, Louisiana, for Mission Ins. Co.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The United States appeals from the dismissal of its suit against the Motor Vessel BIG SAM and its owner to recover oil spill cleanup costs. It is conceded that the sole fault of the accident was the negligent operation of the BIG SAM, which struck a tanker barge and caused the discharge of substantial quantities of oil. The district court held that liability for the cleanup costs was exclusively governed by section 311(g) of the Federal Water Pollution Control Act ["the Act"], 33 U.S.C. §1321(g), and that under this section the sole party responsible was the insolvent bareboat charterer of the BIG SAM.

We reverse, holding (1) that both owner and charterer of the sole-fault, non-discharging vessel are liable under §1321 (g), (2) that this statutory section does not exclude an in rem remedy, and (3) that any maritime tort remedy of the United States against the negligent vessel is not pre-empted by §1321 (g), in view of the express provision of 33 U.S.C. §1321(h)(2) that the liabilities established by the Act "shall in no way affect any rights which . . . the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance."

Factual Context of the Issues

The case originated out of a collision in the Mississippi River between the M/V BIG SAM and the T/B BUTANE, April 25, 1975, which resulted in hull damages to and oil spill from the BUTANE. The BIG SAM is a twin screw towboat, 155 gross tons, which at the time of the collision was owned by Zito Towing, Inc. and bareboat chartered by Tri-Capt, Inc. Due to negligent navigation

and an inexperienced pilot, the BIG SAM collided with the tank barge BUTANE, owned and operated by Delta Barge Line. The collision caused 280,000 gallons of oil to be discharged from the BUTANE. Delta Barge Line immediately began cleanup operations. After spending over $50,000 in cleaning up and protecting water intakes, Delta turned the operation over to the U. S. Coast Guard, which spend almost $300,000 more to finish cleaning up the spill.

The United States brought this suit against the BIG SAM (in rem), Zito (its owner), and Tri-Capt (the vessel's[1] bareboat charterer), alleging causes of action based upon §1321 (g) of the Act, the Refuse Act, 33 U.S.C. §407, and general negligence (maritime tort law), to recover its cleanup costs. The findings in litigation between the private parties were stipulated,[2] under which the sole

---

[1] The United States initially also sued the BUTANE (the discharging vessel) and Delta, its owner and operator. The government does not complain of the dismissal of these parties from the suit, as exculpated from liability because the negligence of the BIG SAM was the sole cause of the collision. See Subsection 1321(f), quoted in note 5 below.

[2] See *Naptha Barge Co. v. Continental Navigation Co.*, 1978 A.M.C. 501, No. 75-1281 (E.D. La. 1977). In this suit, Delta (the owner of the discharging vessel BUTANE) recovered from Tri-Capt. (the bareboat charterer of the BIG SAM) damages, civil penalties paid to the Coast Guard under Subsection 1321(b), costs expended to protect water intake, and the initial and aborted cleanup costs incurred by Delta. The right to recover the latter is expressly recognized by Subsection 1321 (h), which provides

> The liabilities established by this section shall in no way affect any rights which (l) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or . . . .

The United States strongly argues that likewise its own cleanup costs were preserved by the remainder of this subsection 1321(h)(2), which similarly provides that the liability established in Subsection 1321 "shall in no way affect any rights which...(2) the United States

cause of the collision was the negligence of the BIG SAM, the non-discharging third-party vessel. The district court held that liability was determined exclusively by §1321(g); that under that section no in rem remedy against the vessel was recognized; and that under §1321(g) tri-Capt, the bareboat charterer (by now insolvent), was solely at fault and that it alone was thus liable in the amount of $15,500, the limit of liability under the circumstances as provided by §1321(g)[3]

The government contends that the district court erred in not affording an in rem remedy against the solely negligent vessel, and its holding that §1321(g) of the Act provided the exclusive remedy against a third-party non-discharging vessel solely at fault. Before reaching these contentions, we will set forth briefly an overview of sections of the Act relevant to the issues before us.

The Statutory Scheme

The issues before us on this appeal are essentially ones of statutory construction. Involved are not only what remedies were intended by Congress in passing the Act, but as well what remedies were foreclosed.

The Act, 33 U.S.C. §§1251-1376, was originally enacted as the Water Quality Improvement Act of 1970,

---

(Footnote 2 continued)
Government may have against any third party whose actions may in any way have caused or contributed" to discharge.

[3] The district court's opinions to this effect are reported at 505 F.Supp. 1029 (E.D. La. 1981) and 480 F.Supp. 290 (E.D.La. 1979). These opinions reversed an earlier determination by the district court that the remedy provided by the Act was not exclusive. 454 F.Supp. 1144 (E.D. La. 1978).

Pub.L.No.91-224, with relevant provisions reenacted as part of the Federal Water Pollution Control Act Amendments of 1972.[4] The Act prohibits the discharge of oil into the navigable waters of the United States, 33 U.S.C. §1321(b)(l). The government is authorized to clean up any oil spill not properly removed by the discharger, 33 U.S.C. §1321(c)(l), including the emergency power to remove, and if necessary destroy, the discharging vessel, 33 U.S.C. §1321(d).

The Act imposes liability for cleanup costs on "dischargers," and cleanup costs incurred by the government are recoverable under §1321(f)(l),(2),(3)[5] from the

---

[4] The Act as re-enacted in 1972 was applicable to this 1975 accident. Subsequent to 1975 the Act has been amended by the Clean Water Act of 1977, with additional amendments in 1978 and 1980. None of the amendments concern issues presented by this appeal.

[5] 33 U.S.C. Subsection 1321(f)(1)-(3) presently provides:

(f)(l) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be

discharging vessel or facility. If, however (as here), the sole

---

(Footnote 5 continued)

recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000 except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility

cause of the accident is the act or omission of a third party, the government is permitted to recover its cleanup costs from such sole-cause third-party. §1321(g)[6]. The Act also

---

(Footnote 5 continued)

from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

See also: Annot., A.L.R.Fed. 346 (1982).

[6] At the time of the accident in 1975, Subsection 1321(g) provided as follows:

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an actor omission in combination with an act of God, an Act of war, or negligence on the part of the United States. Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section, the liability of such third

expressly provides that the liabilities thereby provided "shall *in no way* affect any rights" that a discharging vessel or facility, *or the United States*, may have against any third party whose acts "may in any way have caused

---

(Footnote 6 continued)

party under this subsection shall not exceed $100 per gross ton if such vessel or $14,000,000, whichever is lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

The subsection was amended in 1977 by Pub.L. 95-217, the Clean Water Act of 1977, in respects immaterial to the present action, including a sentence added to precede the subsection as originally enacted, as follows:

> Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles restores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection.

The legislative reports show that the latter amendment was adopted to assure "that the Government can pursue the insurer or the spiller to recover cleanup costs without awaiting final disposition of all third-party damage claims." S.Rep.No. 95-370 95th Cong., 1st Sess. 64, reprinted in 1977 U.S. Code Cong. & Ad. News 4326, 4389

contributed to the discharge." §1321(h) (emphasis supplied).[7]

A primary issue of this appeal is the interrelationship between subsections (f), (g), and (h), with regard to the liability of a sole-cause non-discharging vessel. These subsections, as re-enacted in 1972 by the Act, are essentially the same as those originally enacted by section 11(f),(g), and (h) of the Water and Environmental Quality Improvement Act of 1970, Pub.L. 91-224, 84 Stat. 91. Committee reports[8] and debates relating to the enactment of these predecesor provisions have been considered as the source of the legislative history of these subsections (f),(g), and (h), although the 1972 committee reports also referred to them without illuminating expression.[9]

---

[7] 33 U.S.C. Subsection 137(h) provides:

> The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

[8] The Conference Report No. 91-940 (to accompany H.R. 4148, which became the 1970 Act, Pub.L. No. 91-224), reprinted in [1970] U.S. Code Cong. & Ad News 2691, 2712, deals with the conference substitute section 11, which became section 11(f),(g) and (h) of the 1970 Act. The Conference Report merely restates the substance of the sections without illuminating explanation. *Id.* at 2724-26. As noted in the text, the present subsections (f),(g) and (h) retain essentially the same language as the 1970 Act.

[9] Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, essentially retained the existing law with regard to oil spills, but increased the maximum liability. The Conference Report No. 92-1236, reprinted in [1972] U.S. Code Cong. & Ad. News 3668, 3776, merely states without explanation (except as to changes in liability limits) the substance of section 311 of the 1972 Act (33 U.S.C. Subsection 1321), *id.* at 3810.

Subsection (f) imposes a strict liability standard under which the United States may recover from a discharger its cleanup costs up to stated limits without a showing of fault. The discharger may, however, escape this strict liability if he shows that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States—or an act or omission of a third party. On the other hand, if the United States proves that the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," the owner is liable to the United States for the full amount of the cleanup costs.

Subsection (g) comes into play when the discharger proves that the discharge "was caused solely by an act or omission" of a third party "*without regard to whether such act or omission was or was not negligent.*" If the discharger can so prove, then the third party is liable for cleanup costs up to stated limits (a strict liability, without fault)—in the case of a vessel, as of 1975 the statutory liability of the "owner or operator...shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser." However, if the United States can prove that the discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of such third party," then the United States may recover from the third party for the full amount of its cleanup costs. Subsection (g) (see note 6) does not expressly recognize an in rem remedy for cleanup costs as a maritime lien, as does subsection (f)(1) (see note 5) with respect to the discharging vessel.

Subsection (h) relates only to third parties whose acts "in any way" caused or contributed to the discharge. It provides that the liabilities established by the Act "shall in no way affect any rights" against such third party that

either the discharging vessel-facility or the United States may have.

Subsection (g), third-party liability.

The principal issue raised with regard to third-party liability is whether subsection (g) provides the exclusive remedy for the government's recovery of oil-spill cleanup costs. Before reaching that issue, however, we will first decide two subsidiary issues of statutory interpretation with regard to that subsection's imposition of strict (no fault) liability upon a third-party vessel whose act or omission was the sole cause of a discharge: (l) whether the Act contemplated that *either* the owner of the non-discharging vessel *or* the operator (the bareboat charterer) shall be so liable, or whether instead the statutory terms contemplate joint and several liability; and (2) whether subsection (g)'s silence as to an in rem remedy against a non-discharging third-party vessel, precludes an admiralty court from affording one to the government? No decision cited to us has touched upon these issues other than the opinion of the district court in the present case.

Liability of "owner or operator": Subsection (g), which emerged from the 1970 Congressional conference committee without explanation, speaks in terms of the liability of the "owner or operator" of the non-discharging third-party vessel. Noting that this liability is expressed in the disjunctive, the able district court interpreted it as "giving a choice of parties, depending on the existing facts." 505 F. Supp. at 1033. Finding that under the existing facts the only third-party whose act or omission caused the discharge was Tri-Capt (the bareboat charterer, in exclusive control of the vessel), the district court held that within the meaning of the statute that Tri-Capt was

the only third party whose act or omission had caused the accident.

In our opinion, the conclusion by the district court errs in regarding the term "owner and operator of a vessel" as disjunctively differentiating liability. This interpretation overlooks that the term "owner and operator" is a term of art in the statute that, as specifically defined therein, means "*any* person owning, operating, or chartering by demise" the vessel in question. 33 U.S.C. §1321(a)(6).[10]

As statutorily defined, the term "owner or operator" refers both to the owner and to the bareboat charterer, and thus in our opinion subsection (g) affords the government a remedy against either or both. Having in mind the intent of the Act to provide an effective remedy through strict liability for recovering cleanup costs from oil spills on navigable waters, it would seem that this construction is more consistent with the legislative purpose than one that would permit an offending vessel or its owners to insulate themselves from liability through a bareboat charter to, as here, an impecunious and uninsured charterer. See *United States v. Lebeouf Bros. Towing Company*, 621 F.2d 787 (5th Cir. 1980) (rejecting a similar attempt under subsection (f) to impose a third-party defense between the owners

---

[10] Section 1321(a) provides as follows:

(a) For the purposes of this section [1321] the term—

. . . . .

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

. . . . .

of the *discharging* vessel (a tanker barge) and the tugboat (the alleged third party) towing it, on the basis that the act or omission of the tugboat was that of an interposed third party).

Section 1321(p) of the Act requires each vessel to maintain evidence of financial responsibility to meet the liability to which it could be subjected under §1321. Zito, the owner of the BIG SAM, argues that 46 C.F.R. §542.4(a), the federal regulation implementing §1321(p), now prevents the non-operating owner from applying for a certificate of financial responsibility and, therefore, from protecting its interest against oil pollution liability.[11] Although an applicant for such a *certificate* can establish evidence of financial responsibility in several ways, one of which is with insurance, 46 C.F.R. §542.8, nevertheless, while the regulation does not *require* the *owner* to secure vessel insurance, neither does it *prohibit* him from doing so. If the owner is assured that the operator has in fact secured such insurance, a matter of course allocable by contractual responsibility, then obviously it need not do so.

We therefore find that the liability of the owner and the operator under subsection (g) is not alternative but is instead joint and several.[12]

---

[11] The regulation was changed in 1978 to allow only operators to apply for such a certificate. At the time of the collision 46 CFR. Subsection 542.4 allowed either the operator or the owner to apply for such certificate. The only complaints dealt with by the Federal Maritime Commission when the regulation was amended in 1978 had to do with the hampering of (1) "spot" or "trip" chartering and (2) the ability to contract for polllution liability if the owner could not apply for the certificate. The Commission found both arguments without merit. The ability to actually insure the vessel does not appear to have been affected by the regulation. See 43 Fed.Reg. 35704, 35706 (August 11, 1978).

[12] The government has not urged this issue of the owner's personal liability upon this appeal, although it disagrees with the district

(2) *In rem remedy against the non-discharging vessel:* In disallowing an in rem remedy, the district court persuasively noted: (a) while an in rem remedy is expressly recognized against the *discharging* vessel by subsection (f), subsection (g) is silent as to the availability of such a remedy against (as here) the non-discharging third-party vessel; (b) that, due to the exclusive remedy provided by the Act (a holding we disapprove below), no independent maritime tort has been created that would give rise to a maritime lien. 505 F.Supp. 1031-32.

As to (a), we should first note that the inclusion of in rem language in subsection (f) is indicated by the conference report as clarifying the existence of the remedy, not as creating it.[13] If the omission of similar clarifying language in subsection (g) was deliberate, the explanation well might be that in subsection (h)(2)(see note 7) the rights of the United States were expressly in no way affected as against any *third party* causing or contributing to the discharge. We are unable to find any Congressional intent in subsection (g) that no in rem remedy should be allowed as against a third-party non-discharging vessel that caused or contributed to the discharge.

As to (b), the decision of the issue under the present

(Footnote 12 continued)
court's ruling. The government is thus unable to obtain relief by personal judgment against the owner on remand.

We reach the issue, however, because a construction of subsection (g) as a whole is of assistance in determining the remaining issues raised by this appeal.

[13] See Conference Rept. No. 91-940, 91st Cong., 2d Sess, reprinted in [1970] U.S. Code Cong. & Ad. News 2691, 2724, where the committee stated: "The inclusion of specific language relating to the maritime lien and actions against the owner or operator are for the purposes of clarification only."

facts is clear. The sole fault of the accident causing the oil spill was the *negligence* of the BIG SAM. Under the Act, the United States may be responsible for removing the substance from the navigable waters unless it is determined that the removal will be done properly by the discharger. 33 U.S.C. §1321(c),(d). As stated in this context, "[n]egligent conduct causing loss to others constitutes a traditional maritime tort." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981). "[T]he federal courts have held that oil pollution is a tort under general maritime law." Comment, Federal Water Pollution Control Act, 53 Tul.L.Rev. 1421, 1422 (1979). "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). See also *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652,672 (1st Cir. 1980).

Thus, even if subsection (g) of the Act provides an exclusive remedy (which below we hold it does not), the damages caused to the United States (its cleanup costs)—even if (as we below reject) subject to the liability limits of the Act—result from a maritime tort, as least when caused by the negligence of a non-discharging vessel on the navigable waters.

A maritime lien, necessary as a prerequisite for the in rem action, Gilmore & Black, *The Law of Admiralty*, §1-12 at 35, §9-19 at 622 (2 ed. 1975), may arise out of a tort claim against a vessel, *id.*,, §9-2, at 587-89. 2 *Benedict, Admiralty*, §11 at 1-58-1-59 (7th ed. 1981). Suit may be brought against the vessel in rem in the proceeding to enforce the lien. Gilmore & Black, *supra*, §9-3 at 589-90. Tort liens may arise against a vessel even when it is under the control of persons neither the owner nor the owner's agents, including that of a bareboat charterer. *The Barnstable*, 181 U.S. 464, 21 S. Ct.

684, 45 L.Ed. 954 (1901); *The China v. Walsh*, 74 U.S. (7 Wall.) 53 19 L.Ed. 67, 73(1868); see also, *Baker v. Raymond Intern., Inc.*, 656 F.2d 173, 183-84 (5th Cir. 1981); *Grigsby v. Coastal Marine Service*, Inc., 412 F.2d 1011, 1030-31 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970).

Thus, the statutory no-fault remedy of limited liability provided by subsection (g) is here grounded also upon sole negligence of the non-discharging third-party vessel. We see no reason why, at least as to a negligent third-party non-discharging vessel, the United States may not exercise an in rem remedy under the general maritime law to recover oil pollution cleanup costs incurred as a result of conduct that constitutes a maritime tort, even though subsection (g) might limit the recovery whether or not the sole-cause act or omission was tortious under the present facts. We need not here decide whether the United States likewise has an in rem remedy when the sole-cause act or omission did not constitute negligence.

Subsection (g): Exclusive Remedy for Government's Recovery of Oil-Spill Cleanup Costs against Negligent Third-Party Non-Discharging Vessel?

Subsection (f) relates to oil-spill liability of discharging vessels or facilities, and subsection (g) relates to such liability for third parties whose act or omission is the sole cause of the discharge. In virtually identical terms (see notes 5 and 6), these subsections provide for (a) strict (no fault liability up to stated limits (excusable only by the intervening sole cause of a limited specified nature) and (b) full liability for all such costs if the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the discharger or third party. By reference to the legislative

history, the government persuasively argues that the specification of these two new remedies was not intended to exclude other remedies available for the recovery of damages (costs of cleanup) caused by oil-spill, such as for those through simple negligence (a maritime tort) of a vessel without the owner's privity or knowledge, where the owner's liability is limited to the value of the vessel and its freight, see 46 U.S.C. Subsection 183(a).

With regard to subsection (f), relating to liability of a discharging vessel, this argument has been rejected by this and other courts. The appellee vessel and owner strongly argue that similar reasoning requires a similar interpretation of the identical language of subsection (g), relating to the liability of a non-discharging sole-cause third-party vessel. For reasons to be explained, we find that as to *third-parties* any Congressional intent to provide subsection (g) as an exclusive remedy for the United States is negated by the express provision of subsection (h)(2)that the liabilities provided by Subsection 1321 "shall in no way affect any rights which . . . the United States Government may have against any third party."

Preliminarily, we note the rationale of the decisions that held that subsection (f) was *implicitly* intended to provide the exclusive remedy against discharging vessels for the government's recovery of its oil-spill cleanup costs. As summarized by this court in *United States v. Dixie Carriers, Inc.*, 627 F.2d 736,739 (5th Cir. 1980):

Although the express language of the statute provides little guidance to indicate Congress' intent the structure of the remedies in section 1321(f)(1) suggests that Congress intended for those statutory remedies to be exclusive. The statute allows the government to recover only a limited

amount of its cleanup costs under a strict liability theory. The government can then obtain additional, unlimited recovery of its cleanup costs only if it can prove willful negligence or willful misconduct with regard to the discharge.

Congress' intent to achieve a balanced and comprehensive remedial scheme in section 1321(f)(1) by matching limited recovery with strict liability and unlimited recovery with proof of willful conduct is apparent from the legislative history. The original Senate bill allowed the government an unlimited recovery upon proof of simple negligence. S.Rep. No. 91-351, 91st Cong., 1st Sess. (1969). The House of Representatives bill limited the government's recovery even upon proof of a willful discharge. H.R. Rep. No. 91-127, 91st Cong., 1st Sess. (1969), reprinted in [1970] U.S. Code Cong. & Admin. News, p. 269.1. The final statute allowing only limited recovery under a strict liability theory and allowing an unlimited recovery only upon proof of willful conduct represents a compromise between the two proposed statutes. See H.R. Conf.Rep.No. 91-940, 91st Cong., 1st Sess. 30-39 (1969), *reprinted in* [1970] U. S. Code Cong. & Admin. News pp. 2712-28.

In enacting a compromise bill that limits the government's recovery for cleanup costs in all cases except those involving willful discharges, Congress apparently intended to deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potentially crushing liability.

A similar conclusion has been reached by the Second and Fourth Circuits. *In re Oswego Barge Corp.*, 664 F.2d 327, 344 (2d Cir. 1981); *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 614-18 (4th Cir. 1979). *See also*: Comment, Federal Water Pollution Control Act, 53 Tul.L.

Rev.1421 (1979); *contra,* Note, Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs, 93 Harv.L.Rev. 1761 (1980).

However, at this point we must note that a facet of the reasoning was that the Act itself did not show any intent to permit other remedies against the *discharger* than those stated by subsection (f). In *Dixie Carriers, supra,* we expressly noted, with regard to other remedies against third parties,

> Section 1321(h)(2) states that the FWPCA [the Act] does not affect the rights which the United States may have against a third party whose actions caused an oil spill. See *United States v. LeBeouf Brothers Towing Co.,* 621 F.2d 787 (5th Cir. 1980) third party defense under section 1321(f)(1) for oil spill from barge does not extend to tug towing barge at time of spill). No such express language allows the government to recover its cleanup costs under the Refuse Act or common law. 627 F.2d at 742. *See also Oswego Barge, supra,* 664 F.2d 327 at 341 n. 19.

In holding that the Act provides an exclusive remedy as against the *discharger, Oswego Barge* contained a thoughtful and well-reasoned discussion of the criteria for gauging whether the Act had pre-empted (as against the *discharger*) other causes of action there asserted, which included both the maritime tort (simple negligence) and the Refuse Act actions, both here presently asserted by the United States against the present *third party non*-discharging vessel. See especially 664 F.2d at 335-39. We see no need to reiterate the detailed reasoning of that opinion but we here note and adopt the salient features of that decision's

excellent analysis of the applicable criteria as to whether the Act [referred to as the "FWPCA" in that opinion] had preempted other statutory or judge-made maritime law remedies.

> With respect to non-maritime federal common law, the Court recently articulated a strict test for determining the pre-emptive effect of a federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981). Instead of inquiring whether "Congress ha[s] affirmatively prescribed the use of federal common law," *id.* 101 S.Ct. at 1791, we are to conclude that federal common law has been preempted as to every question to which the legislative scheme "spoke directly," and every problem that Congress has "addressed." *Ibid.*

664 F.2d at 335.

> The Supreme Court has recognized, however, that the federal judiciary has a more expansive role to play in the development of maritime law than in the development of non-maritime federal common law. [Citations omitted.]

664 F.2d at 335-36.

> In recognizing a substantial law-creating function for federal courts in maritime law, the Supreme Court appears to have applied the presumption of statutory preemption somewhat less forcefully to judge-made maritime law than to non-maritime federal common law. [Citations and discussion omitted].

664 F.2d at 336.

> Ultimately determining whether non-statutory maritime law, as to both liabilities and remedies, survives enactment of a statute requires a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. *Any terms of the statute explicitly preserving or reempting judge made law are of course controlling, as is clear evidence of Congressional intent to achieve such results.* In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. (Emphasis supplied).

664 F.2d at 338-39.

Applying these criteria, we will for reasons stated below find that subsection (g) of the Act did *not* preempt or exclude a remedy in simple-negligence maritime tort, subject to statutory limitation of liabilities, 46 U.S.C. Subsection 183(a); but that it *did* exclude any potential remedy of the United States under the Refuse Act against the third party *non*-discharging vessel.

Subsection (h)(2): Express Preservation of Judge-Made Maritime Tort Remedy to Recover Damages Caused by Oil Spill?

As noted in *Oswego Barge*, "[a]ny terms of the statute explicitly preserving or preempting judge-made law are of course controlling," 664 F.2d at 339. Although no such preservation is evidence by the statutory language with regard to the liability of *dischargers* to the United

States, subsection (h)(2) unequivocably states that "[t]he liabilities established by this section [1321] shall in no way affect any rights which...the United States Government may have against any *third party* whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." The legislative history of this provision, which first appeared in the 1970 predecessor provisions of the Act that establishes the present statutory scheme for recovery of oil-spill cleanup costs, affords no reason not to read this statute according to its unambiguous expression.[14] Thus, as against third parties causing or contributing to an oil spill, the United States may assert other causes of action than those established by subsection (g), or at least any others that are not inconsistent with the remedies thereby provided.

If the BIG SAM's negligence was a concurring in-

---

[14] 33 U.S.C. Subsection 1321(h) was enacted by the Water and Environmental Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91.

This subsection was subsection 12(1) of Senate Bill 7, which stated that

> (1) The liability established by this section shall in no way affect any rights which (1) the owner or operator of a vessel, an onshore or offshore facility, or an onshore or offshore drilling-production facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil.

115 Cong.Rec. 28949 (1969). The conference substitute retained this provision in section 11(h). Conference Rept. No. 91-940, *supra*, note 15. [1970] U.S. Code Cong. & Ad. News at 2726.

The Federal Water Pollution Control Act Amendments of 1972, P.L. No. 92-500, 86 Stat. 816, retained unchanged subsection (h), but with the addition of the final phrase, "or hazardous substance." See reprinted in [1972] U.S. Code Cong. & Ad News 951, 1014.

stead of sole cause of the accident, no statutory provision of the Act applies to prevent the government's recovery of the non-discharging vessel's apportioned share of the oil-spill cleanup-cost damage occasioned by its contributing negligence. *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). We can see no functional reason, nor does the legislative history afford any suggestion of such a purpose, that the government's remedy against the negligent third party vessel should be less because that negligence was the sole instead of merely a contributing cause of the accident.

The government here asserts two causes of action beyond those provided by subsection (g):(1) a maritime tort action, based upon the negligence of the BIG SAM, and (2) an alleged implied action for violation of the Refuse Act. We now turn to these two causes of action alleged:

(1) *Maritime Tort:* As we previously noted, under traditional maritime principles, negligent conduct on the navigable waters that causes loss to another constitutes a maritime tort. *See, e.g., Oswego Barge, supra*, 664 F.2d at 334, 343-44. "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City*, 640 F.2d 963, 969-70 (9th Cir. 1981). Even prior to the enactment of the 1970 predecessor of the present Act, at least one federal district court had recognized a cause of action in maritime tort in favor of a state government for damages caused by an oil discharge into the state territorial waters. *State of California, etc. v. S.S. Bournemouth*, 307 F.Supp. 922, 926-28 (C.C.Cal. 1969). We have little doubt that, even prior to the 1970 enactment, had the United States brought an action to recover damages by way of cleanup costs, recovery would have been allowable under maritime law for a mari-

time tort. See Comment, *supra*, 53 Tul.L. Rev. at 1422-23; Note *supra*, 93 Harv.L.Rev. at 1770-72.

Before us, the government only raises the issue of whether, by virtue of subsection (h)(2)'s express preservation, it is permitted to assert its cause of action in maritime tort against the BIG SAM and its owner, to recover damages to the government (the oil-spill cleanup costs) caused solely by the BIG SAM's negligence, under circumstances where the conduct occurred without the privity or knowledge of the owner-so that the owner is entitled to the limitation of personal liability provided by 46 U.S.C. §183(a) of no more than the value of the vessel and its freight.[15] We have little hesitation in declaring that such a remedy is not inconsistent with the remedy provided by subsection (g). See *United States v. City of Redwood City*, 640 F.2d 963, 970 (9th Cir. 1981). The allowance of the remedy thereby permitted does not thwart any Congressional purpose of the Act to protect vessel owners from potentially crushing liability and from an uninsurable risk, since the vessel is so liable and insurable to those limits

---

[15] From a reading of the House debates on the Conference Report No. 91-940, on H.R. 4148 (which ultimately became the 1970 Act), it is apparent that Congress was aware of additional remedies that might be subject to the limitations of 46 U.S.C. Subsection 183(a). For instance, Congressman Cramer, a leading manager of the legislation, states that

> It should be borne in mind that this limitation of liability is solely for cleanup costs by the United States and does not propose to limit liability that might be imposed by State law or that exists under common law....
>
> If there are charges that another government would wish to make, say in the case of a spill that involved both the United States and Canada, or if there are charges or damages due to third parties under admiralty law or common law, these would be in addition and would not be subject to our limitation of liability.

116 Cong. Rec. 9326-27 (1970) (remarks by Rep. Cramer).

since the vessel is so liable and insurable to those limits against recovery of damages caused by maritime torts, whether the present one or others.

We expressly do not reach two issues, unnecessary for us to decide under present facts: (1) whether a maritime tort not subject to the limitation of liability because of the owner's knowledge or privity would be inconsistent with the remedy provided by the Act for willful conduct or willful negligence; and (2) whether the maritime tort remedy provides a recovery that is cumulative to or concurrent with the remedy provided by subsection (g).[16]

(2) *The Refuse Act:* Section 13 of the Rivers and Harbors Act, 33 U.S.C. §407 (commonly referred to as the "Refuse Act") prohibits the discharge of the "refuse matter" (which has judicially been interpreted to include oil) from any vessel into the navigable waters of the United States. The United States argues that a civil remedy action is implied by that statute, and it seeks recovery on that basis also.

With regard to the remedy against the discharger, the courts have consistently held that any Refuse Act remedy for cleanup damages is inconsistent with the remedy against discharger provided by the subsection (f) and is therefore preempted by that latter statute. *Oswego Barge, supra,* 664 F.2d at 343; *Dixie Carriers, supra,* 627 F.2d at 740. The essential reasoning is that any such strict liability remedy held to be implied by the Refuse Act, would provide

[16] If cumulative, the government might recover both the subsection (g) limits and the limitation-of-liability limits, where its actual cost exceeded the highest of the two. If concurrent, the United States would recover only the higher of the two limits. Here, however, the record indicates that the value of the vessel is substantially greater than the $300,000 cleanup-cost damages sustained by the government.

recovery of damages without limitation, while subsection (f) in providing strict (no fault) liability provides for specified limits.[17]

For identical reasons, we affirm the district court's conclusion that subsection (g), providing for strict liability in limited amount against a faultless third-party causing the accident, is inconsistent with the no-limitation strict liability remedy to be implied from the Refuse Act.

Conclusion

Accordingly, we AFFIRM the district court's dismissal of the United States claim insofar as based upon the Refuse Act; but we REVERSE the dismissal of the government's maritime tort claim and the district court's disallowance of an in rem remedy for the subsection (g) cleanup-cost damages resulting from the BIG SAM's negligence. The case is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

---

[17] See *Oswego Barge, supra*, 664 F.2d at 343:

> To whatever extent judge-made remedies for violation of the Refuse Act include recovery for cleanup costs based on strict liability, such remedies would be plainly inconsistent with the FWPCA because the strict liability remedy of the FWPCA is subject to dollar limitations while recovery of damages under the Rivers and Harbors Act of 1899, when permitted at all, is not subject to the limits of the Limitation Act, *University of Texas Medical Branch v. United States*, 557 F.2d 438 (5th Cir. 1977), cert. denied, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978); *In re Chinese Maritime Trust Ltd.*, 478 F.2d 1357 (2d Cir. 1973), cert. denied, 414 U.S. 1143, 94 S.Ct. 894, 39 L.Ed.2d 98 (1974). Allowing the Government a judge-made damage remedy without limits in strict liability under the Refuse Act would amount to "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp., supra* [436 U.S. 618 at 625, 98 S.Ct. 2010 at 2015, 56 L.Ed.2d 581 (1978).]

APPENDIX "C"

UNITED STATES of America,
Plaintiff-Appellant,

v.

M/V BIG SAM, in rem, et al.,
Defendants-Appellees.

No. 81-3127.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1982.

Wendy M. Keats, Leonard Schaitman, Thomas W. Snook, Allen Van Emmerik, Dept. of Justice, Civ. Div., Washington, D.C., for plaintiff-appellant.

Normand F. Pizza, New Orleans, La., for M/V Big Sam and Zito Towing Co.

Leonard N. Bouzon, Thomas J. Wagner, Richard A. Sabalot, New Orleans, La., for Mission Ins. Co.

Machale A. Miller, New Orleans, La., for amicus Water Quality.

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 30, 1982, 5 Cir., 1982
681 F.2d 432)

Before WISDOM, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The principal issues of this appeal relate to the proper statutory construction of section 311(g), (h), Federal Water Pollution Control Act, 33 U.S.C. § 1321(g), (h). *See* panel opinion at 681 F.2d 432. The focus of the defendant parties' applications for rehearing is the alleged inconsistency of the panel's interpretation of these subsections (g) and (h), with prior interpretations of subsection (f), section 311(f), 33 U.S.C. § 1321(f). The panel adheres to its construction of subsections (g) and (h), as based on the unambiguous statutory language that presumably reflects the unambiguous Congressional intent —especially since the legislative history gives no reason to doubt that the legislative words mean precisely what they say. Even assuming that the alleged inconsistency between subsection (f) and (g) is illogical,[1] it is for Congress to correct the syllogism, not the courts.

I.

Subsections (f), (g), and (h) relate to liability for the costs of removing pollution of navigable waters of the United States caused by the discharge of oil or hazardous substances. Subsection (f) provides that the *discharger* will be liable without fault but only up to a limited amount specified by statute,[2] except where the discharger can

[1] The panel does not, however, concede that this inconsistency is irrational or beyond the Congressional purview in the enactment of this complicated legislation compromising conflicting interests. *See, e.g.*, note 8 *infra*.

[2] However, the discharger will be liable to the full amount of

prove that the sole cause of the discharge was, *inter alia*, "an act or omission of *a third party* without regard to whether any such act or omission was or was not negligent." Subsection (g) similarly provides for strict (no fault) liability in limited amount for such sole-cause third party, with similar exceptions. Subsection (h) provides, however, that the liabilities established by the Act "shall *in no way* affect *any* rights" that the United States or other persons "may have against any third party whose acts may in any way have caused or contributed to such discharge."

The uncontroverted facts before the court show: The defendant vessel, BIG SAM, collided with a tank barge and caused an oil spill to be discharged from the latter. The sole cause of the collision was the negligence of BIG SAM, the non-discharging third-party vessel. BIG SAM and its owners contended that their exclusive liability for the cleanup costs was provided by the sole-cause strict liability provisions of subsection (g), under which (based on BIG SAM's 155 gross tons) liability was limited to $15,500. The panel held, however, that BIG SAM—undoubtedly liable as the "sole cause" third party, irrespective of negligence, under subsection (g)—was subject to liability for the damages[3] caused by its *negligence* and thus that subsection (g) "sole [no fault] *cause*" liability was not exclusive and did not relieve BIG SAM and its owners of their liability[4] under ordinary maritime tort principles. The

---

(Footnote 2 continued)
clean up costs where the discharge is "the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Subsection (f).

[3] Subject, however, to the limitation of liability provided by 46 U.S.C. § 183(a).

[4] Since the value of the vessel was greater than the $300,000

panel so concluded, because of the unambigious provision of subsection (h)(2) that the liabilities established by the Act

> *shall in no way affect* any rights which...the United States Government may have against any third party whose actions *may in any way have caused OR contributed* to the discharge of oil or hazardous substance. (Emphasis and boldface added.)

That the construction given by the panel to subsection (h) reflects its literal and unambiguous meaning is scarcely questioned by the rehearing applicants or the dissent from denial of an en banc hearing. Furthermore, the rather scant committee reports concerning the provisions of the Act, as hammered out by a conference committee compromising conflicting approaches and interests, are silent of any reason to believe the words do not mean what they say. Nor has anything in the legislative history or debates called to our attention any concern about relieving nondischarging third parties of their liability under maritime tort principles for their negligence;[5] these

---

(Footnote 4 continued)
cleanup costs demanded, the panel did not reach the issue of whether the maritime tort and the subsection (g) strict liabilities against the third party are concurrent (so that the United States may recover only the greater of the two amounts) or instead cumulative. 681 F.2d at 444 and n. 16.

[5] The concerns at which attention were primarily directed in these sources were to the liabilities of *dischargers*, subject to crushing potential liability against which insurance could not be procured because of the day-to-day exposure to risk of discharge in the transportation of oil and other hazardous substances. These concerns did not necessarily implicate any inability of vessels not engaged in such trade to secure insurance for tort damages resulting from collision with another vessel, whether or not it carried oil; or with crushing personal liability of the tort-causing vessel's owner in excess of the insurance limits, for these

sources reflect to the contrary, if anything.

Instead, the panel's construction is attacked as being inconsistent with the judicial construction given almost identical language in subsection (f) concerning the strict liability of *discharger* itself. In *United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980), a panel of this court held that, with regard to a discharger—admitting that "the express language of the statute provides little guidance to indicate Congress' intent," 627 F.2d at 739—subsection (f) provided the exclusive remedy for the government to recover cleanup costs, and that a remedy against the discharger for ordinary negligence in maritime tort seems to have been excluded "by a balanced and comprehensive remedial scheme in section 1321(f)(1) by matching limited recovery with strict liability and unlimited recovery with proof of willful conduct." *Id.* In support of this ultimate conclusion, however, *Dixie Carriers* pointed out instances in the Act where other specific remedies were allowed—including that the Act "does not affect rights which the United States may have against a *third party* whose actions caused an oil spill," citing subsection (h), 627 F.2d at 742—and pointed out that, as against a discharger, "[n]o such express language allows the government to recover its cleanup costs under the...common law."[6] 627 F.2d at 742. Thus, in *Dixie Carriers* we in part relied upon subsection (h)'s provision, expressly preserving maritime tort remedies as against third parties (without an equivalent preservation against dischargers), as supporting

(Footnote 5 continued)
owners were already protected from such excessive exposure by the limitation of liability act, 46 U.S.C. § 183(a).

[6] Earlier in its discussion, the court had referred to the remedy sought as being under "common law maritime tort" theory. 627 F.2d at 741.

the construction that such maritime tort remedies were *not* preserved but were instead supplanted as against *dischargers* themselves by the strict-liability remedy of subsection (f).

The panel thus perceives no inconsistency in the respective constructions given by it to subsections (g) and (h) and by *Dixie Carriers* to subsection (f), given the different and additional statutory provision expressly applicable to third parties alone by subsection (h) and expressly relied upon both by this panel and by *Dixie Carriers* in explaining their respective constructions of subsections (f) and (g).

II.

The complaint as to the panel's construction of subsections (g) and (h) is thus not directed to any error in construing or overlooking unambiguous language of the statute, nor is it in truth directed at any inconsistency between our holding and that in *Dixie Carriers*.

The complaint, rather, is that Congress was inconsistent in providing an exclusive strict liability remedy against dischargers by subsection (f) (if correctly construed by *Dixie Carriers*, which admitted the ambiguity of the statute in that regard[7]), but in permitting against negligent third parties a maritime tort remedy as well (whether

[7] The government, conceding the panel decision to be correct, asked for rehearing en banc in order to overrule *Dixie Carriers*, as affording a construction of subsection (f) that was inconsistent with the present panel's of subsection (g). At least the members of the panel felt that it would be inappropriate to reconsider *Dixie Carriers* where no litigation against a discharger was at actual issue and that, besides, Congress may well have intended to treat discharger and third party differently in that regard, as indicated in *Dixie Carriers*. *See* note 8 *infra*.

concurrent or cumulative, *see* note 4 *supra*). We who are not Congressmen might think it is illogical to permit the Act's strict liability remedy to supplant maritime tort remedies against a negligent discharger who created the bulk of the risk, but not against a negligent non-discharging third person who causes a discharge.[8]

However inconsistent we may think this disparate treatment, however much we may be of the view that we could tidy up the statute and make of it what to us seems to be more sense, it is simply not part of our function as judges to re-write, in the guise of statutory construction,

---

[8] However, if we were members of Congress concerned with economic reality as well as logic, and if we had had the benefit of the extensive hearings as to the problems of insuring against oil-pollution damage, we may have concluded that third parties needed no such exclusive-liability feature to obtain adequate insurance protection, as compared with those in the category of dischargers, who are exposed daily (rather than exceptionally) to the risk of causing oil-pollution damage, *see* note 5 *supra*.

Dixie Carriers quotes a leading Congressional exponent of the conference compromise ultimately enacted as stating, 627 F.2d at 739-40:

> Limitations of liability and imposition of liability should not be such as to preclude the possibility of recovery of cleanup costs from the *discharger*. We felt that the gauge of this liability should be whether or not insurance could be obtained to cover these events. Consequently, the House bill provided for limitations of liability for vessels based upon an evaluation of the world insurance market for this new type of risk. (Emphasis supplied.)

> If this was the basis upon which Congress decided to treat differently the liability of dischargers and of non-discharging third parties, it would be difficult for judges to determine that this classification was irrational or unreasonable so as somehow to ignore or to re-write unambiguous language that provided the oil-pollution liability of negligent non-discharging third persons to be different from that Congressionally provided for negligent dischargers.

unambiguous statutory language in order to cure what to us seems to be statutory deficiencies. Last term, the Supreme Court so admonished on at least two occasions.

In *American Tobacco Company v. Patterson*, __ U.S. __, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982), reversing a circuit court's interpretation of unambiguous statutory language to different effect, the Court noted that while "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results where possible, "__ U.S. __, 102 S.Ct. at 1538.

> [a]s in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962), Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2055, 64 L.Ed.2d 766 (1980).[9]

---

[9] Considering that the present unambiguous subsection (h) was involved in a text hammered out in conference committee as a compromise of conflicting interests and approaches, we also find particularly appropriate the Court's further remarks, __ U.S. __ at __, 102 S.Ct. at 1537:

> The plain language of § 703(h) is particularly cogent in light of the circumstances of its drafting. It was part of the Dirksen-Mansfield compromise bill which represented "not merely weeks, but months of labor." 110 Cong.Rec. 11935 (1964) (remarks of Sen. Dirksen). As Senator Dirksen explained, "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase."

__ U.S. at __, 102 S.Ct. at 1537.

Again, in *Griffin v. Oceanic Contractors, Inc.*, __ U.S. __, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), the Supreme Court reversed this circuit and its line of decisions that had "sensibly" construed a statute provision contrary to its unambiguous expression, and the Court explicitly enjoined against creative judicial interpretation of an unambiguous statute in order to accord with its supposed purpose (despite absence of any legislative history indicating any intention other than that expressed by the unambiguous wording):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. (1940). See *Caminetti v. United States*, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning...would thwart the obvious purpose of the statute.' " *Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11, 61 S.Ct. 368, 371, 85 L.Ed. 303 (1941)). This, however, is not the exceptional case.

__ U.S. at __, 102 S.Ct. at 3250.

It is true that interpretations of a statute which

would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *Unitd States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542-543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940); *Haggar v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930).

__ U.S. at __, 102 S.Ct. at 3252.

In summary, as to the issue now before us, the panel adheres to its view that we should apply unambiguous statutory provisions as written. The statutory compromise of differing interests and approaches may indeed contain inconsistencies and ambiguities in some of its *other* provisions (as typically compromise legislation does within the competence of Congress). Nevertheless, the panel finds these alleged inconsistencies to be no reason to refuse to apply the unambiguous provisions, solely before us, as written, in the complete absence of any legislative history contraindicating the intent unambiguously stated by the particular provision at issue (subsection (h)) as written.

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CHARLES CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge, with whom BROWN, RUBIN and JOLLY, Circuit Judges, join, dissenting from the denial of Suggestion for Rehearing En Banc:

With a certain deference, I dissent from the refusal of the court to accord en banc consideration to this appeal. Our refusal to do so leaves standing the panel opinion,[1] one which deranges the apparent plan of the Federal Water Pollution and Control Act (FWPCA) and, taken in combination with our earlier decision in *United States v. Dixie Carriers, Inc.*,[2] produces consequences sufficiently anomalous that I am in serious doubt the Congress could have intended them. As now construed by two panels of our court, operating separately, the FWPCA calls to mind nothing so much as the wag's depiction of a camel: a horse designed by a committee. On this construction, actual dischargers of oil pollutants who are guilty of no more than simple negligence are protected by tonnage limitations on their cleanup liabilities, while third parties whose simple negligence is the cause of such spills are—as maritime tortfeasors—subject to being crushed by full and unlimited liability for the consequences.

---

[1] Reported at 681 F.2d 432 (5th Cir. 1982).

[2] 627 F.2d 736 (5th Cir. 1980).

I am in no sense certain that the panel opinion's construction, founded as it is on the rock of a literal reading of the statute, is incorrect. It well may be that the strange result produced, having been configured by literal words of the Congress, must be endured by our maritime commerce until the Congress gets around to correcting it. But since neither I nor the panel can make out the faintest rhyme or reason for such an enactment, and since there are plausible arguments against according the act such an irrational construction, I think that these latter should have been addressed by the en banc court, which exists to—and alone can—harmonize panel decisions of our court short of a resort to the over-taxed higher authority.

The FWPCA: A Comprehensive Compromise.

The 1970 amendments to the FWPCA represent Congress' response to the nation's increasing need for imported oil and to the consequent increased risk of environmental damage from oil spills. See *United States v. Bear Marine Services,* 509 F.Supp. 710, 713 (E.D.La. 1980).[3] As might have been expected, the final enactment was a compromise. In its original form, the Senate bill would have allowed the government an unlimited cleanup recovery upon proof of mere negligence, while the House proposal would, by contrast, have limited that recovery even in the case of a willful discharge. See *United States v. Dixie Carriers, Inc.,* 627 F.2d 736, 739 (5th Cir. 1980). "The final statute allowing only limited recovery under a strict liability theory and allowing an unlimited recovery only upon proof of willful conduct represents a compromise between the two proposed statutes." *Id.* at 739.[4]

---

[3] Presently on appeal and awaiting final decision in this case.

[4] We also observed there, in responding to a government conten-

Discharger Liability according to Dixie Carriers.

The crucial subsections of the statute for our present purposes are 33 U.S.C. Sections 1321(f), (g) and (h). The first two, (f) and (g), are conceptionally and linguistically parallel, as we shall see.

Subsection (f), as pertinent here, provides that a discharger of pollutants is to be held strictly liable for a limited amount of cleanup costs unless he can prove himself into one or more of the four statutory exceptions, and is liable without limit if the government establishes that his discharge was a willful one. The four exceptions comprise discharges caused solely by acts of God or of war, negligence by the government, and the act (whether or not negligent) of a third party.[5]

(Footnote 4 continued)
tion that it should be permitted to recover unlimited amounts on subsisting maritime tort theories, that "[e]very court that has considered this issue has held that the FWPCA provides the government's exclusive remedy for recovering oil spill cleanup costs," citing numerous authorities, including the district court decision reversed by the panel in the instant case. *Id.* at 738. Thus the reasoning of the panel is in patent conflict with the general view of the statute taken by the *Dixie Carriers* court.

[5] The apposite language of subsection (f) is:

> Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an

Citing the apparent intent of Congress to enact "a compromise bill that limits the government's recovery for cleanup costs in all cases except those involving willful discharges" and so to "deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potential crushing liability."[6] our earlier panel rejected the contention of the United States that where it could establish simple negligence on the part of a *discharger* the maritime tort action was not preempted by the statutes and a full recovery might be had. Instead, it accepted the discharger's argument that "the language, legislative history, and general statutory scheme of the FWPCA demonstrate Congress' intent to provide an exclusive and comprehensive remedy for the government to clean up oil spills and to recover cleanup expenses." *Dixie Carriers, supra* at 738. Judge-made theories of maritime tort were, in the view of the *Dixie Carriers* court, swept away by the FWPCA insofar as they intruded upon the Congress' comprehensive scheme of limited absolute liability for negligent carrier-dischargers. With the instant panel decision, however, we learn that the congressional scheme was not comprehensive after all, since those same carriers (or others), should they find themselves the sole cause of *another's* oil spill, remain subject to unlimited

(Footnote 5 continued)

inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.

[6] *Dixie Carriers*, 627 F.2d at 739.

liability in maritime tort. And thus our committee construction of the FWPCA: limited liability if one negligently dumps his own oil; unlimited liability if one negligently causes another to dump him. A crazy-quilt indeed, one by which Mr. Bumble would have been pleased.

Third-Party Liability, according to Big Sam.

Subsection (g) governs the liability of third parties who solely cause oil spills. Taking up on subsection (f)'s third-party exeption to discharger liability, that section provides the identical liability for such a third-party sole-causer to that of a discharger. Unless such a third-party causer can prove himself into the same exceptions to liability granted in subsection (f) to the discharger, his liability is substituted for that of the discharger.[7]

[7] The apposite language of Subsection (g) is:

> In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an

The instant panel has concluded that this is not so, that those whose simple negligence causes discharges by others are to be exposed to "potentially crushing liability," *supra*, are meant by the Congress to incur it, rather than or in addition to the limited liability scheduled. Thus he who, carrying oil, solely and carelessly causes another to discharge it, is to be—in appropriate circumstances—crushed, while he who carried it and carelessly discharged it is to be shielded. Nor is this anomalous treatment limited to third parties who have engaged in oil carriage and reaped the benefit of the rates charged for such commerce; any third party will do as a sacrifice. It seems to me arguable that the Congress did not and could not have intended such an exercise in statutory Russian Roulette.

The Maritime Tort Exception.

Subsection (h) preserves all rights that the government "may have against any *third party* whose actions may have in any caused or contributed to the discharge...." (Emphasis supplied.)

The panel has held that by reason of the above, and despite Section)g), the government may recover without limit against a third-party sole-causer. Thus, we decree, he may be crushed, while an equal-fault discharger is to be shielded. By default, the court en banc agrees. From that

---

(Footnote 7 continued)

inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore of offshore facility from which the discharge actually occurred if such owner or operator were liable.

default, I respectfully dissent: that Congress has said so in terms is persuasively arguable, perhaps plain; that its intent was to say so is, in my view, dubuious—sufficiently so that I am satisfied our court has slighted its en banc function by refusing to face and resolve a fundamental conflict in principle between its panels, to adopt the approach of the *Big Sam* panel and limit or disapprove the reasoning of *Dixie Carriers*, or to consider the countervailing arguments for a construction of the Act consonant with our prior panel decision in *Dixie Carriers*. Among these are:

1. As noted above, our earlier *Dixie Carriers* opinion concluded that, since subsection (f)'s liability limitations apply in cases of simple negligence, the FWPCA preempts the general maritime tort remedy for such negligence. Though that decision concerned the liability of dischargers, the decision of the *Big Sam* panel that subsection (g)—textually and conceptually identical to and interlocking with subsection (f)—does not preempt the general maritime tort remedy for simple negligence of third-party causers of discharges conflicts in principle with *Dixie Carriers* and throws the general congressional scheme into irrational disarray.

2. By focusing exclusively on the literal language of subsection (h) preserving the government's rights against third-party causers, the panel opinion saps the limitation of liability provided them by subsection (g) of vitality and all but reads it out of the statute.

3. The *Big Sam* panel adopts as to third-party causers the approach of the original Senate bill—unlimited recovery for simple negligence—that was squarely rejected by the Congress. Such an adoption of a rejected approach in the teeth of the legislative history conflicts with the

strongest settled principles of statutory construction, both in this court and in the Supreme Court. *See, e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 196, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

These do not seem to me to be inconsiderable arguments, especially in view of the curious result to which a single-minded focus on the language of subsection (h) has led our panel in this case. Nevertheless, our court refuses even to consider them en banc.

So doing, it passes to an overburdened Supreme Court the task of relieving those within our jurisdiction from burdens of which it is probable the Congress meant to discharge them, preserves a clear conflict in principle in our decisions, and abdicates what I conceive to be its major function.

APPENDIX "D"

UNITED STATES OF AMERICA

V.

M/V BIG SAM, in rem, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B Butane, in rem, Keith S. Edwards, and Water Quality Insurance Syndicate

Civ. A. No. 78-86

United States District Court, E.D. Louisiana

May 9, 1978

Gerald J. Gallinghouse, U.S. Atty., Leonard P. Avery, Asst. U. S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Sec., Dept. of Justice, Washington, D. C., for plaintiff U.S.

Francis Emmett, New Orleans, La., for defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Ins. Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge BUTANE.

Normand F. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Poitevent & Hanemann, John Poitevent, Trial Atty., New Orleans, La., for Tri-Capt. Inc.

Phelps, Dunbar, Marks, Claverie & Sims, Leonard N.

Bouzon, Thomas J. Wagner, Trial Attys., New Orleans, La., for Mission Ins. Co.

HEEBE, Chief Judge.

This cause came on for hearing on a previous day on the (1) motion of defendants M/V Big Sam and Zito Towing, Inc. to enjoin seizure of vessel or in the alternative to set bond; (2) motion of defendants M/V Big Sam and Zito Towing, Inc., to dismiss causes of action one and two against the M/V Big Sam; (3) motion by defendant Zito Towing, Inc., to dismiss causes of action one, two and three against Zito Towing, Inc.; (4) motion of defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Insurance Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge Butane to dismiss or for summary judgment.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants M/V Big Sam and Zito Towing, Inc., to enjoin seizure of vessel or in the alternative to set bond, be, and the same is hereby GRANTED to the extent that seizure of the vessel is enjoined but only if defendants M/V Big Sam or Zito Towing, Inc., post security of $400,000.00.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendants M/V Big Sam and Zito Towing, Inc., to dismiss causes of action one and two against the M/V Big Sam, be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendant Zito Towing, Inc., to dismiss causes of action one, two and three against Zito Towing, Inc., be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Insurance Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge Butane to dismiss or for summary judgment, be, and the same is hereby, DENIED.

REASONS

This action was brought by the United States in admiralty to recover civil penalties and the expense of oil removal resulting from a discharge of oil by T/B Butane after a collision on April 25, 1975, between M/V Big Sam and T/B Butane in the Mississippi River.

Defendant M/V Big Sam is a tugboat of 155 gross tons, presently owned by defendant Zito Towing, Inc. Defendants TriCapt, Inc., and Zito Towing, Inc., were and presently are incorporated and doing business in Louisiana and were the owner, operator and charterer of M/V BIG SAM on April 25, 1975. Defendant T/B Butane is a barge of 1,324 gross tons, presently owned by defendant Keith S. Edwards d/b/a Delta Barge Line was and now is an individual domiciled in the State of Texas and doing business in Louisiana and was the owner and operator of T/B Butane on April 25, 1975.

The complaint of the United States alleges six causes of action. The first cause of action alleges that defendants M/V Big Sam, Tri-Capt., Inc., and Zito Towing,

Inc., and their officers, agents and employees were negligent in the operation of M/V Big Sam, that the negligence caused the discharge of oil into the river, and that the United States is entitled to damages for the expense of oil removal ($278,648.36). The second cause of action alleges that M/V Big Sam and T/B Butane are liable under the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411-412, for, respectively, causing a discharge and discharging of refuse matter (oil) into the navigable water of the United States and that both are liable in damages for the expense of removal and the M/V Big Sam is additionally liable for a penalty from $500.00 to $2,500.00 to be fixed by the Court. The third cause of action alleges liability by all defendants for plaintiff's expense of oil removal under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251, *et seq.*, arising against defendants T/B Butane and Keith S. Edwards d/b/a Delta Barge Line for discharge of oil into navigable waters and against defendants M/V Big Sam, Tri-Capt, Inc., and Zito Towing, Inc., for causing oil to be discharged in navigable waters. The fourth and fifth causes of action are brought pursuant to the Louisiana Direct Action Statute, LSA-R.S. 22:655, against ABC Insurance Company and Water Quality Insurance Syndicate, the Protection and Indemnity Insurers respectively, of M/V Big Sam and its owners and operators and of T/B Butane and its owners and operators on April 25, 1975, against the risk of claims alleged in the complaint, for the expense of removal of oil from the river. The sixth cause of action seeks a $500.00 penalty against Tri-Capt, Inc., for failure of the operator of the M/V Big Sam to hold a license for the section of the river around mile 103 AHOP in violation of 46 U.S.C. §405.

1. The causes of action against the M/V Big Sam.

While the vessel M/V Big Sam has three causes of action alleged against it (negligence [maritime tort], Refuse Act violation [33 U.S.C. §407], and violation of Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1251, *et seq.*]), its motion is to dismiss only the negligence and Refuse Act claims. Since it does not appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," these causes of action cannot properly be dismissed. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

a. The negligence claim alleges that the M/V Big Sam negligently collided with T/B Butane and caused the discharge of an estimated 210,000 gallons of crude oil from T/B Butane into the Mississippi River. Defendants deny that any such cause of action or right of action exists.

In evaluating these contentions, we observe that a cause of action for negligence traditionally has four elements:

1-A duty or obligation recognized by the law requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.

2-A failure on his part to conform to the standard required.

3-A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause."

4-Actual loss or damage resulting to the interests of another.

See, Prosser, Law of Torts, §30 (4th Ed. 1971).

While it is not clear which element or elements the defendants contend to be legally nonexistent, the law seems to embody all of these elements.

There is the question of whether or not there is a duty under law by a vessel operating on the navigable waters of the Mississippi River to use due care with respect to the United States in avoiding oil spillage which the United States might become liable to clean-up. Both existing jurisprudence and wise public policy dictate this Court's conclusion that the United States is owed such a duty. As stated in *State Department of Fish and Game v. S.S. Bournemouth*, 307 F.Supp. 922, 929 (C.D. Cal. 1969):

> "Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse in rem against the offending vessel for damages to compensate for the loss."

While the United States does not own the waters of the Mississippi River into which the oil was spilled, the federal government does have constitutional and statutory responsibility to preserve, protect and maintain the country's navigable waters, including the Mississippi River. This includes the "inherent power to protect the public welfare by bringing common law suits" for damages for oil

pollution, recognized in *State of Maryland v. Almerada Hess Corp.*, 350 F.Supp. 1060, 1066-1067 (D.Md. 1972). "The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded." *American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241, 1247 (D.Fla. 1971), *rev'd on other grnds.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280, *reh. den.*, 412 U.S. 933, 93 S.Ct. 2746, 37 L.Ed.2d 162. These cases are predicated on the existence of proximately caused actual damage to the United States.

Defendant contends that there would be an inconsistency between the existence of a maritime tort for oil spillage and the delineation of the rights of the United States in 33 U.S.C. §1321(g), setting third party owner or operator liability at $100.00 per gross ton of the vessel, or $14,000,000.00, whichever is lesser. However, this contention flies in the face of 33 U.S.C. §1321(o), which clearly preserves any existing obligations for damages in the following language:

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.
>
> "(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not

in conflict with this section."

An examination of the legislative history of the Federal Water Pollution Control Act Amendments of 1972 found at 1972 U.S. Code Cong. & Admin. News, p. 3668, 3731-3733, indicates that "The portions of this section [Section 311-Oil and Hazardous Substance Liability] that deal with clean-up liability for oil discharges are taken from existing law. Modifications add liability for the clean-up of any hazardous material discharged on to the navigable waters." The Committee Report further states that "We have examined the issue of whether there should be financial limitations of liability for the costs of removal of hazardous polluting substances, and we have concluded that there should be no liability limitations imposed. * * * [H]azardous substances heretofore treated in a separate section should be subject to the same control mechanism applied to oil."

b. The United States also brought an action *in rem* against M/V Big Sam for alleged discharge of refuse matter into the navigable waters in violation of the Refuse Act of 1899, 33 U.S.C. §407. In pertinent part, the statute reads:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from or out of any ship, barge, or other floating craft of any kind . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States . . . ."

The liability of vessels engaged in violations of this statute is set forth in the second sentence of 33 U.S.C. §412, which in pertinent part reads as follows:

> "And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408 and 409 of this title shall, be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft . . . and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

Defendant's contention that *United States v. Beatty, Inc.*, 401 F.Supp. 1040 (W.D.Ky. 1975), requires dismissal because of the absence of an indictment or information against the M/V Big Sam is a misinterpretation of that case. The *Beatty* decision related to prosecutions under 33 U.S.C. §411 and properly held that such criminal prosecutions cannot proceed in the absence of an indictment or information. Here, the action is noncriminal and is brought under 33 U.S.C. §412 for damages and civil penalties. This *in rem* proceeding does not require an information or indictment. *The Scow* "6-S," 250 U.S. §269, 272, 39 S.Ct. 452, 63 L.Ed. 977 (1919); *The Barbara Cates*, 17 F.Supp. 241, 243-244 (E.D.Pa. 1936); *United States v. M/V Martin*, 198 F.Supp. 171, 176 (S.D. Ill. 1961), aff'd 313 F.2d 851 (7th Cir. 1963).

Accordingly, causes of action one and two against the M/V Big Sam should not be dismissed.

2. The causes of action against Zito Towing, Inc.

While Zito Towing, Inc. has moved for dismissal of causes of action one, two and three against it, the complaint only names Zito Towing, Inc., as a defendant in

causes one (which alleges maritime tort) and three (which alleges violation of the Federal Water Pollution Control Act Amendments of 1972).

a. Zito Towing, Inc., is the alleged owner of the tugboat M/V Big Sam. The existence of vessel owner liability for the tort of oil pollution has been recognized in the jurisprudence. *State of Maryland, Dept. of N. Res. v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D.Md. 1972); *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D.Me. 1973), aff'd 559 F.2d 1200. The availability of such a remedy furthers the public interest by serving as an added inducement for such owners to exercise due care. See, *Potomac Riv. Ass'n. Inc. v. Lundeberg Md. Sea. Sch., Inc.*, 402 F.Supp. 344, 356-357 (D.Md. 1975). The clear public interest in avoiding pollution from oil spills has already been noted in *State Department of Fish and Game v. S.S. Bournemouth*, 307 F.Supp. 922, 929 (C.D. Cal. 1969).

b. Zito Towing, Inc., has also alleged itself free of liability under the Federal Water Pollution Control Act Amendments of 1972 by virtue of the fact that there was a finding in *Naptha Barge Company v. Continental Navigataon Company*, CA No. 75-1281, Section H, Eastern District of Louisiana, that the owner, pro hac vice, operator and claimant of the M/V Big Sam was Tri-Capt, Inc. and that there was no finding in that case that there was willful negligence or willful misconduct within the privity or knowledge of Zito Towing, Inc. However, the *Naptha Barge* case was simply a collision damages suit between private parties and the United States did not participate in the proceedings of that case. That suit thus did not address the claims of the United States, if any, under the Federal Water Pollution Control Act Amendments or 1972, 33 U.S.C. §1251, *et seq.*, and particularly under section 1321(g).

To that extent that defendant seeks by this motion to obtain collateral estoppel or res judicata against the United States, we note that those are affirmative defenses which normally are raised by way of answer to the complaint. F.R. Civ. P. Rule 8(c). However, in the interest of efficient and expeditious judicial administration of justice, a defense such as res judicata or collateral estoppel may be raised either by motion or in the answer. 5 Wright & Miller, *Federal Practice and Procedure*, §1277 (1969); *Hartmann v. Time, Inc.*, 166 F.2d 127, 131 n.3 (3rd Cir. 1947); *Thistlethwaite v. City of New York*, 362 F.Supp. 88, aff'd 497 F.2d 339, *cert. den.* 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686 (1974). In allowing such defenses to be adjudicated on motion rather than by way of answer, the court should give all parties the opportunity to present pertinent evidentiary material to the court. 5 Wright & Miller, *supra* at p. 331. In the instant case, the government attorney expressly stated during oral argument that he wishes to present evidence with respect to the res judicata or collateral estoppel issues but cannot do so until discovery has progressed further. At the present time, this case is quite young, having been filed on January 10, 1978. Until discovery has reached a stage where all parties have had a fair opportunity to develop the evidence pertinent to the issues of collateral estoppel or res judicata, this Court cannot properly address those issues. *Collins v. PBW Stock Exchange, Inc.*, 408 F.Supp. 1344 (D.Pa. 1976).

Accordingly, the causes of action against Zito Towing, Inc., cannot be properly dismissed.

3. Motion to enjoin seizure of M/V Big Sam or in the alternative to set bond at $31,000.00

a. Existence of maritime liens.

Defendants M/V Big Sam and Zito Towing, Inc., move to enjoin seizure of the M/V Big Sam on grounds that there is no maritime lien against the vessel for the causes of action alleged. Defendants are mistaken.

With respect to the alleged maritime tort of oil pollution, the existence of a martime lien has been expressly recognized in *State of California v. S.S. Bournemouth*, 307 F.Supp. 922, 926 (C.D. Cal. 1966), as follows:

> "Defendant takes the position that only two types of maritime torts create maritime liens: collision claims and personal injury claims. . . .The court finds no merit in defendant's position and is of the opinion that the tort in question is martime in nature; that a maritime lien against the Bournemouth arises in favor of the plaintiff which will support an admiralty action *in rem*, as a matter of general maritime law without the aid or necessity of a statutory lien. . . ."

With respect to the alleged violation of the Refuse Act, there is a summary proceeding *in rem* against the vessel pursuant to 33 U.S.C. §412. As observed in *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 215, 18 L.Ed. 753 (1867), "in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

With respect to the alleged violation of the Federal Water Pollution Control Act Amendments of 1972, there arises a statutory lien pursuant to 33 U.S.C. §1321(g) as to the vessel causing the discharge from another vessel. This lien is maritime in nature, in light of the fact that it arises out of conduct which is peculiarly maritime (viz., spillage of oil on the navigable waters in the course of shipping the oil

in vessels on the navigable waters). *See Gilmore & Black, The Law of Admiralty*, §9-20 (2d Ed. 1975), which says at p. 629 n.95b:

> "The Federal Water Quality Improvement Act of 1970...gives maritime lien status to actions by the United States to recover its costs for cleaning up pollution of navigable waters resulting from the discharge of oil and other substances. The statute does not characterize the lien which should no doubt be categorized as a tort lien."

b. Amounts of liens.

While the Court concludes that there are alleged maritime liens against the M/V Big Sam arising out of each of plaintiff's causes of actions against that vessel, the amounts of the liens are not the same in all instances. Under the Federal Water Pollution Control Act Amendments, 33 U.S.C. §1321 (g), the lien would be limited to $31,000.00. However, under the lien would equal the amount of costs shown by the government to be reasonable plus perhaps interest and costs (subject to the maximum set by the value of the vessel and its cargo under 46 U.S.C. §183). *Burgess v. Tamano*, 564, F.2d 964, 983 (1st Cir. 1977). In light of the government's claim that actual removal costs were $278,648.36, the amount of the lien for either of these causes of action could reasonably equal that amount. The amount of security which the plaintiff would seek in lieu of exercising seizure is $400,000.00, which is reasonable under Rule E(5)(a)(i) of the supplemental Rules for Certain Admiralty and Maritime Claims, which authorize the maximum value of a special bond to be set at twice the amount of plaintiff's claims.

Defendants request that seizure not be allowed on the

grounds of the contention that there is no maritime lien and the contention that seizure would work an irreparable hardship on defendant. As already shown, the former contention has no merit. As to the latter contention, if defendant posts a bond in the amount of $400,000.00, then seizure will not be necessary. Because lien are alleged under maritime tort law and the Refuse Act, the security posted cannot merely be limited to the $31,000.00 which would suffice if the only alleged lien were under the Federal Water Pollution Control Act Amendments.

4. Motion to dismiss or for summary judgment in favor of defendants Keith S. Edwards d/b/a Delta Barge Line and Water Quality Insurance Syndicate.

Keith S. Edwards d/b/a Delta Barge Line is the owner of the T/B Butane, a tank barge. Water Quality Insurance Syndicate is the oil pollution insurer of the T/B Butane with respect to liabilities of vessels and owners as provided by the Federal Water Pollution Control Act Amendments of 1972.

The T/B Butane was the face barge in a string of three barges being pushed by the M/V Letha C. Edwards (a tug) in the Mississippi River at the time of the collision which caused the oil spill in question. The T/B Butane was a dumb barge without motive power or crew and entirely in control of the M/V Letha C. Edwards, which was operated by Naptha Barge Company, a Texas Corporation. The collision between M/V Big Sam (under the operation of Tri-Capt, Inc.) and the flotilla including T/B Butane occurred in daylight on April 25, 1975.

Defendants Edwards and T/B Butane contend that they are entitled to have the complaint dismissed and/or summary judgment on all claims asserted under the Federal

Water Pollution Control Act of 1972(1) because it has been judicially established that the spill from the Butane was caused by ". . . an act or omission of a third party," and (2) because the Butane was a dumb barge under the control of a tug when the collision and spill occurred and she, the Butane, could not possibly be at fault, as no conceivable facts could render her so.

The motion to dismiss certainly cannot be granted because the complaint does indeed set forth allegations which, if proved, would comprise a valid claim under the Federal Water Pollution Control Act. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). It is not inconceivable that a dumb barge may have contained some defect of design, loading, or otherwise which could have resulted in needless spillage as a result of a collision.

With respect to the claim for summary judgment, the United States has expressly requested an opportunity to engage in discovery to ascertain whether or not there is any merit to defendant's assertion that it has a defense under 33 U.S.C. §1321(f). As already noted above, the Court is of the opinion that at the present time the government has not had ample opportunity to develop any pertinent evidence it may wish to present on the issues of collateral estoppel or res judicata with respect to the Naptha Barge proceeding in which it was not a party. Discovery in the instant proceeding should proceed forthwith, and defendants may wish to renew their summary judgment motion at a later point.

Defendants contend that their participation in the instant proceedings necessarily will result in undesirable multiplicity of litigation because of their allegedly inevitable ability to recover from the United States in the Court of Claims any amount the United States may recover from

them in the instant action. This argument is not cognent at the present time because of the dispute as to whether defendants qualify under 33 U.S.C. §1321(i)(1) as an owner or operator who "acts to remove" a spill, an issue which cannot on the present state of the record be definitively decided in defendants' favor. Further, defendants' reliance on the Naptha Barge decision as to which there has not been ample opportunity for the government to do discovery precludes disposition of this question at the present time.

The additional contentions of the defendants are that there can be liability under the Rivers and Harbors Act of 1899 because (1) that Act was superseded by the Federal Water Pollution Control Act of 1972, (2) the 1899 Act only applies to refuse which hinders navigation or anchorage, and (3) the 1899 Act requires proof of fault, which is allegedly impossible in the instant case.

(1) With respect to defendants' first contention, this Court concludes that the Rivers and Harbors Act of 1899 (also called Federal Refuse Act of 1899) still retains vitality. Specific support for the proposition that the Federal Water Pollution Control Act Amendments of 1972 do not supersede the 1899 Act is provided by *United States ex rel. Scott v. United States Steel Corp.*, 356 F.Supp. 556, 559 (N.D.Ill. 1973), where the court says:

> "Defendant argues that the Federal Refuse Act has been superseded by the 1972 amendments to the Federal Water Pollution Control Act .... Suffice it to say that the 1972 amendments did not purport to repeal the Federal Refuse Act which, on the contrary, was specifically preserved by the 1970 amendments to the Federal Water Pollution Control Act (33 U.S.C. §1174 (2) and by Section 511(a)(2)(B) of the 1972 amendments (P.L. 92-500)."

The fact that the 1972 Act expressly makes reference to the 1899 Act in its savings clause (33 U.S.C. §1371) substantially eviscerates defendants' contention that the newer legislation should be viewed as an amendment of the older. Indeed, the very case cited by defendant in support of the proposition that newer legislation should be viewed as amending older legislation says that the general rule applies when "there is no statutory language which makes any cross-reference," which is just the contrary of the situation before this Court. *Hines, Inc. v. United States*, 551 F.2d 717, 725 (6th Cir. 1977). *Also see United States v. United States Steel Corporation*, 328 F.Supp. 354, 358 (N.D. Ind. 1970), where a district court rejected the argument that it should "accommodate" or "reconcile" the 1899 Act with the 1970 Federal Water Pollution Control Act in a manner which would in effect repeal the 1899 Act.

The specific language of the 1972 Act provides that "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter . . . ." 33 U.S.C. §1371(a)(1). While not considering this specific language, the United States District Court for the Eastern District of Virginia reached the conclusion that the 1972 Act is the sole available basis upon which the federal government may seek recovery of clean-up costs, a decision which is presently on appeal to the Fourth Circuit. Complaint of Steuart Transportation Co., 435 F.Supp. 798, 807808 (E.D.Va. 1977), says:

> As to the United States' claim for clean-up costs, the Court holds that FWPCA acts as a limit to that claim regardless of the basis on which it is made. By enacting FWPCA, Congress comprehensively established standards and limits of liability

> for oil spill clean-up costs. The Government will not be permitted to present a claim for such costs under general maritime law, common law, or other statutes. *See* 3 Benedict on Admiralty, §112; contra Gilmore & Black, *The Law of Admiralty* 828-29."

There does not appear to be any basis either in statutory language of the 1972 Act or in its legislative history for the Court's conclusion that the 1972 Act provides the sole basis upon which the United States may recover actual clean-up costs it expends. Rather, liability for actual costs of removal under 33 U.S.C. §1321(f) is limited to discharges in violation of 33 U.S.C. §1321(b)(3) which prohibits only discharges in "harmful quantities as determined by the President under paragraph (4)" of subsection b. Likewise, third party liability under 33 U.S.C. §1321(g) is limited to violations of subsection (b)(3). Not only are these violations limited to infractions of presidential regulations but furthermore section (h)(2) expressly provides that "The liabilities established by this section shall in no way affect any rights which . . . (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. §1321(h)(2). The language of section (h)(2) expressly contradicts the conclusion of the court in *Steuart Transportation* that "The Government will not be permitted to present a claim for such costs under general maritime law, common law, or other statute."

The purpose or the 1972 Act is clearly to provide a basis on which the United States can obtain a recovery, not eliminate already existing remedies to the government, including those under prior statutes. For example, the legislative history of the 1972 Act shows that Congress was

specifically aware of and wished to keep in place as an effective enforcement medium the Refuse Act of 1899. Senator Griffin remarked to Senator Muskie, floor manager of the 1972 Act:

> "During the last 2 years there have been some 300 criminal convictions under section 13 of the Refuse Act and over 120 civil actions most of which resulted in the defendants either stopping the dumping or agreeing to institute pollution control programs. On the other hand, it is my understanding there have been only a handful of prosecutions for violation of water quality standards since the Federal Water Pollution Control Act was enacted. "In view of this—a fact recognized by the conferees—it is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act."

United States v. Rohm & Haas Company, 500 F.2d 167, 171 n.2 (5th Cir. 1974) (118 Cong. Rec.S. 16882, October 4, 1972).

Further, when Congress wanted to specifically relegate particular discharges to the 1972 Act in derogation of previous statutes, it did so explicitly. For example, 33 U.S.C. §1371 (b) expressly states that discharges of pollutants into the navigable waters subject to certain acts of 1910 and 1888 will be subject to the 1972 Act rather than the older acts except as to effect on navigation and anchorage.

Furthermore, while there are express limitations in the statutory language of 33 U.S.C. §§1321(f) and (g) on the extent of liability imposed under causes of action created by those subsections, there is no inconsistency in finding that

those limitations embodied in 33 U.S.C. §§1321(f) and (g) do not pertain to the entirely separate causes of action created by the 1899 Act or by common law. It is not at all infrequent under the law that the same or similar conduct may subject one to civil suit under various causes of action, each of which may in turn be subject to different defenses and different specific elements of quantum of damages. For example, conduct violative of the Fair Housing Act of 1968 (42 U.S.C. §§3601-3631) may also violate one of the general provisions protecting civil rights (e.g., 42 U.S.C. §1981 or 42 U.S.C. §1982). Or conduct violative of the Securities Act of 1933 may also state a cause of action under the Securities Exchange Act of 1934. The availability of such alternative remedies in the 1899 Act or common law and the 1972 Act is not an inconsistency in the law and does not fall within the purview of "inconsistency" envisioned by Congress in 33 U.S.C. §1371(a)(1).

Had Congress so intended, it could easily have provided that suit under 33 U.S.C. §§1321(f) and (g) is the exclusive grounds of civil liability in favor of the United States for the conduct here at issue. Congress certainly knows how to use the word "exclusive" when that word captures its intent. See, e.g., Longshoremen's and Harbor Workers' Compensation Act, §5, 33 U.S.C. §905. Congress did not express the concept of exclusivity in the 1972 Federal Water Pollution Control Act.

Accordingly, this Court concludes that the 1899 Act is still a significant source of remedy for governmental expenditures for oil spill removal.

(2) Defendants' contention that oil cannot qualify as refuse under the 1899 Act has been expressly repudiated by the United States Supreme Court. As stated in *United*

States v. Standard Oil Co., 384 U.S. 224, 229-230, 86 S.Ct. 1427, 1430, 16 L.Ed.2d 492 (1966). "There is nothing more serving of the label 'refuse' than oil spilled into a river." Defendants' reliance on the one paragraph per curiam opinion of the Fifth Circuit in *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140 (N.D.Ala. 1971), aff'd 456 F.2d 1294 (5th Cir. 1972), *cert. den.*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973), *reh. den.*, 411 U.S. 910, 93 S.Ct. 1524, 36 L.Ed.2d 201 (1973), is misplaced. As stated by the United States Supreme Court in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 671-672, 93 S.Ct. 1804, 1815, 36 L.Ed.2d 567 (1973):

> "The lower courts have almost universally agreed, as did the courts below, that §13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation. [Numerous citations omitted]: contra, *Guthrie v. Alabama By-Products Co.*. . . ."

Furthermore, the United States pleads and contends that it is prepared to prove that T/B Butane's discharge of 210,000 gallons of crude oil constituted an interference with navigation, so that if the question of interference with navigation is in issue, there is genuine factual dispute with respect to it, precluding summary judgment.

(3) The defendants dispute the government's contention that the alleged violation of the Rivers and Harbors Act of 1899 imposes liability without fault. Unfortunately, for defendants, the Fifth Circuit has expressly held with regard to sections 408 and 412 (33 U.S.C. §§408, 412) that "Together these statutes have been construed to impose strict liability." *United States v. Tug Colette Malloy*, 507

F.2d 1019, 1022 (5th Cir. 1975). However, the Fifth Circuit's opinion does go on to say that if a defendant can show that another party is solely at fault in causing an accident, then a defense is established. Id. Defendants' citation of *United States v. Raven*, 500 F.2d 728 (5th Cir. 1974), is inapposite. The language of Chief Judge Brown that "the duty to say is confined to those who negligently cause the obstructiron (*Id.* at 733) had reference to the duty to mark and remove sunken vessels imposed under 33 U.S.C. §409 and was made in the context of a criminal prosecution, whereas the instant proceedings relate to 33 U.S.C. §§407 and 412 and are civil rather than criminal. As plainly noted in *United States v. The Terry E. Buchanan, Etc.*, 138 F.Supp. 754, 755-756 (S.D.N.Y. 1956):

> [S]tatutes prohibiting the dumping of refuse into harbors have been held to impose liability regardless of negligence or intent on the part of the ship's owner or master. In *The Colombo*, 2 Cir., 1930, 42 F.2d 211, a ship had leaked oil into the harbor because of the negligence of one of the seamen. The Court held that the fact that the master or owner had not authorized the unlawful act did not prevent liability. *See also The J. Rich Steers*, 2 Cir., 1915, 228 F. 319; *The Scow No. 36*, 1 Cir., 1906, 144 F. 932. In *The President Coolidge*, 9 Cir., 1939, 101 F.2d 638, this rule of strict liability was followed where a Chinese cook dumped refuse over the side of a ship in direct contravention to his employer's orders. The courts have upheld these strict liability statutes [vis., 33 U.S.C. §§407 or 408, together with 412] because of the government's power to enact laws for the protection of the general welfare.

APPENDIX "E"

UNITED STATES of America

v.

M/V BIG SAM, *in rem*, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B BUTANE, *in rem*, Keith S. Edwards, and Water Quality Insurance Syndicate.

Civ. A. No. 78-86.

United States District Court
E. D. Louisiana.

Nov. 30, 1979.

John P. Volz, U.S. Atty., Leonard P. Avery, Asst. U.S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., for plaintiff United States of America.

Francis Emmett, New Orleans, La., for defendants Keith S. Edwards d/b/a Delta Barge Line, Water Quality Ins. Syndicate, and Keith S. Edwards d/b/a Delta Barge Line as claimant of the Barge BUTANE.

Normand F. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Thomas J. Wagner, Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for defendant Mission Ins. Co.

HEEBE, Chief Judge:

On its own motion, this Court heard oral argument and received additional memoranda relative to reconsideration of its ruling of May 9, 1978, as it relates to a determination of two issues: whether or not the United States has a cause of action for recovery of its actual expenses incurred in oil clean-up operations based on a maritime tort of oil pollution; what the interaction is between the Refuse Act of the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411-12, and the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251, *et seq.* Contrary to our decision, published at 454 F.Supp. 1144 (1978), other courts have held that no tort action exists and that the FWPCA pre-empts the Refuse Act.

In *United States v. Dixie Carriers, Inc.*, 462 F.Supp. 1126 (E.D.La., 1978), the court said: "On the narrow issue of the liability of vessel owners and operators for the full amount of the United States oil spill cleanup expenses, I find that the statutes (Refuse Act of Rivers and Harbors Act and FWPCA) do conflict and the Refuse Act must give way." The court in *Complaint of Steuart Transportation Company*, 435 F.Supp. 798 (E.D.Va., 1977), stated: "The court holds that FWPCA acts as a limit to [the claim of the United States for oil spill clean-up expenses] regardless of the basis on which it is made. By enacting FWPCA, Congress comprehensively established standards and limits of liability for oil spill clean-up costs." (This latter case was affirmed, *Steuart Transp. Co. v. Allied Towing Corp., Etc.*, 596 F.2d 609 (4th Cir. 1979).) See, also *In re Oswego Barge Corp.*, No. 76-CV-269 (N.D.N.Y., Nov. 13, 1978).

On further examination, we have reconsidered these cases and are convinced by their reasoning. Consequently, the Court has decided to reverse its former decision in order to follow them and put ourselves in accord with the majority

view. This decision has several effects. First, the motion of Zito Towing, Inc. and the M/V BIG SAM for summary judgment against Mission Insurance Company, presently under submission in this case, is now moot. Second, the Court will accede to the alternative request submitted on behalf of Zito Towing and the M/V BIG SAM and reduce the bond required in the previous decision to a maximum of $15,500 ($100 x 155 gross tons), based on the tonnage of the BIG SAM. However, under this decision, we only decide that the United States has one cause of action against the parties, and that it is pursuant to the FWPCA. The Court is not determining, at this time, whether or not the claim is actually viable against all of the parties, but is amenable to receiving independent motions from any party desiring to raise the issue individually, in light of this new position the Court now takes. In particular, we are inclined to believe that defendants, Keith S. Edwards, d/b/a Delta Barge Lines, as claimant of the Barge BUTANE, should have a definitive indication from the United States as to what evidence they rely on to indicate any potential liability of these defendants under the FWPCA at this time.

Subsequent to the reargument of the matters presented above and submission of them to the Court, the United States moved the Court for a continuance of the trial in this matter, which is set for December 10, 1979. The basis for the motion is that this Court should wait the outcome of the decision on the appeal of *United States v. Dixie Carriers, Inc.*, supra, which the Fifth Circuit Court of Appeals has agreed to consider. As noted, the question in that case also is whether the FWPCA bars relief based on the Refuse Act and maritime tort. Without any means of determining when a decision will be rendered by the Fifth Circuit and whether or not the decision will then be appealed, we think it would be burdensome to defendants to have our case stayed for an

undefined period of time. However, because the Court itself is unable to try this case on that day because it will be trying a criminal case which must be heard at that time, the trial date will have to be continued, but to a fixed time. It may be that the action will be disposed of without the necessity of a trial, but a new trial date will be assigned in order to cover all eventualities. Accordingly,

IT IS THE ORDER OF THE COURT that the decision of the Court dated May 9, 1978, be, and the same is hereby, REVERSED and those causes of action set forth by the United States in its complaint based on tort liability or the Rivers and Harbors Act are hereby DISMISSED as to all named defendants.

IT IS THE FURTHER ORDER OF THE COURT that the previously set bond be, and the same is hereby, REDUCED to a maximum of $15,500, based on the tonnage of the M/V BIG SAM.

IT IS THE FURTHER ORDER OF THE COURT that the trial of this case, presently set for December 10, 1979, be and the same is hereby, CONTINUED to June 16, 1980, with a pre-trial conference SET for June 6, 1980.

APPENDIX "F"

UNITED STATES of America

v.

M/V BIG SAM, *in rem*, Tri-Capt, Inc., Zito Towing, Inc., ABC Insurance Co., T/B BUTANE, *in rem*, Keith S. Edwards, and Water Quality Insurance Syndicate.

Civ. A. No. 78-86.

United States District Court, E. D. Louisiana.

Jan. 22, 1981

John P. Volz, U.S. Atty., Leonard P. Avery, Asst. U.S. Atty., New Orleans, La., James A. Lewis, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., for plaintiff United States of America.

Normand R. Pizza, Reuter & Reuter, New Orleans, La., for defendants M/V BIG SAM and Zito Towing, Inc.

Thomas J. Wagner, Phelps, Dunbar, Marks, Claverie & Sims, New Orleans, La., for defendant Mission Insurance Co.

HEEBE, Chief Judge:

On April 25, 1975, the M/V BIG SAM collided with an oil-carrying barge, the T/B BUTANE, in the Mississippi River and caused a substantial oil spill. The United States

cleaned up the oil spill. Suit was filed on the collision, which included all parties to the collision as litigants. Judgment was rendered in the suit on April 29, 1977. The Findings of Fact and Conclusions of Law reached in that suit, *Naptha Barge Co. v. Continental Navigation Co.*, No. 75-1281 (E.D.La.), have been stipulated to by the parties and agreed to as binding on them for the purposes of this suit.

The United States declined the request of the parties to the *Naptha Barge case* to join in that suit and, instead, on January 10, 1978, filed the instant suit to recover its expenses in cleaning up the oil spill that resulted from the collision of the M/V BIG SAM with the barge T/B BUTANE. Although the suit was originally brought on several different bases, this Court, on November 30, 1979, held that the United States had only one basis on which to recover for its cleanup activities and that was under the Federal Water Pollution Control Act, 33 U.S.C. §1321 (1973). *United States v. M/V BIG SAM*, 480 F.Supp. 290 (E.D.La. 1979). This view was subsequently affirmed on the appeal of another case in *United States v. Dixie Carrier, Inc.*, 627 F.2d 736, 742 (5th Cir. 1980), where the court categorically held that:

> In the absence of a clearer indication from Congress that the government may obtain recovery under additional theories, we conclude that the balanced and comprehensive scheme in 1321(f)(1) provides the exclusive remedy for the government to recover its cleanup costs from oil spills.

In the *Dixie Carrier* case, the oil spill occurred when a tugboat lost control of the tanker barges in its tow and one of them struck a bridge, discharging over a million gallons of oil into the Mississippi River. Consequently,

§1321(f)(1) of the FWPCA, which provides for recovery by the government of cleanup costs from the "owner or operator of any vessel from which oil... is discharged," was the applicable section of the Act for that case.

However, it is agreed in this case that the owner of the vessel, Zito Towing, Inc., had bareboat chartered the M/V BIG SAM to Tri-Capt, Inc., which was the sole operator of the vessel at the time it collided with the oil barge T/B BUTANE, which was then in the tow of the tugboat M/V LETHA C. EDWARDS, Zito Towing did not operate the BIG SAM at any time relevant to this occurrence. The court, in the *Naptha Barge* case, found that the M/V BIG SAM, while under bareboat charter to Tri-Capt, Inc., was the sole proximate cause of the collision and consequent discharge of oil from the BUTANE into the river. Therefore, 33 U.S.C. §1321(g) of the FWPCA, which applies to third-party liability, rather than subsection (f) of the Act, is applicable here. Section 1321(g) comes into play under an exception to §1321(f)(1) which provides a defense to the owner or operator of a discharging vessel where such "owner or operator can prove that a discharge was caused solely by... an act or omission of a third party...." Section 1321(g) provides, in pertinent part, that:

> where the owner or operator of a vessel ... proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party...such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government.... The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Although the actual costs of the cleanup to the United States exceeds the amount, liability under the FWPCA is limited to $15,500, i.e., $100 times the 155 gross ton weight of the M/V BIG SAM. 33 U.S.C. §1321(g) (1973). The government is not claiming that the discharge of oil was the result of willful negligence or willful misconduct within the privity or knowledge of a third party and is therefore limited to the maximum statutory amount under section 1321(g).

Having held that the FWPCA is the sole basis for the government to recover its cleanup costs, we are left with two final questions in this case. The *first*, in two parts, is (1) whether the FWPCA, under section 1321(g), establishes liability against the M/V BIG SAM, *in rem*, and (2) whether it establishes liability against the owner of the M/V BIG SAM, Zito Towing, Inc., under the facts of this case. The *second* is whether the United States is entitled to recover prejudgment interest on its award under the FWPCA. Initially, there was also a question as to whether Mission Insurance Co., the insurer of the M/V BIG SAM for Zito Towing, could be held liable. However, it was subsequently agreed by the government that its insurance provided protection and indemnity coverage, but not insurance against FWPCA claims.

1. *Action In Rem*

The FWPCA under section 1321(f)(1) expressly provides for a lien against the discharging vessel. The section states that the costs recoverable by the government:

> shall constitute a maritime lien on such vessel which may be recovered in an action *in rem* in the district court of the United States for any district

> within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

Even though section 1321(g) is devoid of any similar language which would provide for a right to bring an action *in rem* when a third-party vessel causes the discharge of oil, the United States takes the position that admiralty courts can infer appropriate remedies when necessary and that this would include inferring a maritime lien when a vessel is a principal in an act or omission that causes a discharge. The case of *State of California v. S.S. Bournemouth*, 307 F.Supp. 922, at 926 & 929 (C.D.Cal. 1969), is relied on as authority for this position. We do not think that the *Bournemouth* case gives such support. In that case, in which the state had filed a complaint *in rem* against a vessel to recover damages incurred because the vessel was discharging oil into the state's navigable waters, the court held that the complaint stated a maritime cause of action in tort giving rise to a maritime lien and consequent suit *in rem* in admiralty, independent of any statute. We have held to the contrary with respect to an independent maritime tort claim. However, the court in *Bournemouth*, supra at 924, did note that if the complaint had been brought pursuant to sections 151 and 152 of the California Harbors and Navigation Code, the plaintiff would have not been entitled to proceed *in rem* since the statute does not provide for a lien on the offending vessel and "a maritime lien is a necessary condition to a suit *in rem* in admiralty." The court did not attempt to read an implied right to a maritime lien into the statute as the government requests us to do here.

The government also relies on the fact that in this

Court's decision on reconsideration of *United States v. M/V BIG SAM*, 454 F.Supp. 1144 (E.D.La. 1978), in which the Court restricted the United States to the FWPCA claim alone, the Court continued in existence the lien established in the earlier decision, however limited to the amount recoverable under the FWPCA claim. But, in this second opinion, the Court, supra, 480 F.Supp. at 291, carefully limited the reconsideration to two issues, namely, whether the United States had claims under maritime tort or under the Refuse Act in addition to that under the FWPCA. In reducing the amount of the bond required, the Court, supra, stated this was being done pursuant to a specific request on the part of Zito Towing and the M/V BIG SAM and that its only decision was limited to a holding "that the United States has one cause of action against the parties, and that it is pursuant to the FWPCA." Considering the fact that Congress did provide for a maritime lien, and accompanying action *in rem*, in subsection (f) but not in subsection (g), we can only conclude that it did not intend to provide for actions *in rem* under subsection (g). We therefore hold that the United States is not entitled to bring an action *in rem* against the M/V BIG SAM pursuant to section 1321(g).

2. *Liability of Zito Towing*

As previously stated, it is stipulated that Zito Towing owned the M/V BIG SAM and Tri-Capt operated as a bareboat charterer at the time of the collision which caused the discharge of oil from the T/B BUTANE. It is furhter stipulated that the sole cause of the collision and ensuing discharge was the negligent manner in which the M/V BIG SAM was operated. It is clear from the *Naptha Barge* decision that there was nothing inherently wrong with the vessel, itself, which caused the accident. As a matter of

fact, the operator hired by Tri-Capt to navigate the M/V BIG SAM was found by the Coast Guard, after the accident, to be in violation of 46 U.S.C. §405 in that he did not hold the proper license to navigate the tugboat in the waters where the accident occurred. The Coast Guard assessed a penalty against Tri-Capt for this violation.

The government, however, asserts that, in addition to Tri-Capt, Zito Towing should also be liable to it for the costs of the cleanup of the oil spill, as limited, because third-party liability should be read as joint and several for both the third-party vessel owner and operator. Section 1321(g) provides for liability on the "owner or operator." The statute, 33 U.S.C. §1321(a)(6), defines "owner or operator" as "in the case of a vessel, any person owning, operating, or chartering by demise, such vessel." And, according to the government, liability is joint and several because this definition provides inclusive, rather than mutually exclusive, alternatives. We disagree with the government's position. We read the statute as being in the disjunctive and giving a choice of parties, depending on the existing facts. Subsection (g) requires proof that the offending discharge was *caused* by the act or omission of the third party to be charged. This same language is carried through in the provision of exoneration from liability of the offending vessel in section 1321(f)(1), which requires the owner or operator to prove that the discharge was caused solely by the act or omission of a third party. Under our existing facts there is only one third party which caused the discharge and that is Tri-Capt. There could, of course, be circumstances where both owner and operator of a vessel are actually or technically at fault. But that is clearly not the case here.

The government also relies on the recent case of

United States v. LeBeouf Brothers Towing Company, 621 F.2d 787 (5th Cir. 1980), in support of its argument for joint liability on owner and operator, without more. In *LeBeouf*, a tanker barge owner sought to be exonerated under section 1321(f)(1) on the basis that the tugboat hired by LeBeouf to tow its tanker barge to a specified location was a "third party." The offending discharge occurred when a crewman of the hired tugboat accidentally opened the wrong valve on the tanker barge and discharged oil onto the Mississippi River. The Fifth Circuit was deciding the case under section 1321(f)(1), which provides that an "owner or operator of any *vessel from which oil* or a hazardous substance is discharged. . shall, notwithstanding any other provision of law, be liable to the United States Government ...." The court refused to let the owner of the tanker barge from which the oil was discharged out from liability for cleanup costs under section 1321(f)(1) because it recognized the legislative purpose in drafting section 1321(f)(1) as a strict liability statute. Therefore, the court refused to find that the tugboat was a "third party" for the purpose of relieving the owner of the vessel from which the oil spill occurred from liability. It found support for this in the case of *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977), in which the court similarly refused to find that a temporary local pilot, who negligently ran a supertanker into a submerged ledge in a Maine harbor, was a "third party" under section 1321(f)(1) for the purpose of relieving the owner of the supertanker from liability for the oil spill which occurred. This legislative purpose was also recognized by the Fifth Circuit in the *Dixie Carriers* case, supra at 739-740, where the court noted that the provision for limited recovery under section 1321(f)(1) was matched to strict liability, as compared to that section's provision for unlimited recovery with proof of willful conduct. That the intent was to impose strict liability on the discharging

vessel is clear from the legislative history, discussed as follows:

> Under absolute liability with limits, a vessel owner would be absolutely liable regardless of fault, but the injured party would be limited in the amount of the damages which could be collected. This approach avoids the difficult, if not impossible, task of proving negligence or rebutting the case for nonnegligence made by the vessel owner. It also places the risk on the responsible party, not on the general public.
>
> It should be noted that the insurance industry and the oil industry testified that they could not imagine a circumstance where a discharge of oil would occur without some degree of negligence. Therefore, it appears that negligent liability with a reverse burden of proof and absolute liability and similar in practical application. The practical advantage to absolute liability, of course, is that it would avoid litigation with the vessel owner on the question of responsibility.
>
> The oil pollution section deals only with the matter of clean up of discharges and costs associated therewith. The bill in no ways affects the right of third parties against the party causing the discharge.

S. Rep. No. 91-351, 91st Cong., 1st Sess. 5 (1969).

On the other hand, all parties agree that the case before us falls under section 1321(g), which provides that where an owner or operator of a vessel from which oil is discharged "proves that such discharge of oil... *was caused* solely by an act or omission of a *third party* ... such *third party* shall, not withstanding any other provision of law, be

liable to the United States Government for the actual costs incurred... for removal of such oil... or substance by the United States Government," subject to the same limitation as found in section 1321(f). The limitation provision does provide that, if the third party is the owner or operator of a vessel which causes the discharge of oil, the liability of such third party is based on the tonnage of the vessel owned or operated by the third party. This third-party situation refers to actual cause, and the legislative history reflects that it covers situations where a third party causes an unrelated, oil-carrying vessel to spill oil. *United States v. LeBeouf Brothers Towing Co.*, supra at 789; S.Rep.No. 91-351, 91st Cong., 1st Sess. 6 (1969). Additionally, in *LeBeouf*, the court found that LeBeouf had retained ultimate control over the tugboat which it hired to tow its barge and noted that the *Burgess* court also found that the local pilot was subject to the ultimate control of the ship and was acting for the ship. In the instant case, Zito Towing retained no control over the BIG SAM and the vessel was not on the business of the owner, Zito Towing. Our case, therefore, is factually distinguishable from these two cases which were decided under section 1321(f)(1).

Under the stipulated facts, there is no question that the third party which caused the oil spill in this case was Tri-Capt, the bareboat charterer and owner pro hac vice of the BIG SAM, and not Zito Towing, the owner of the vessel. Consequently, we cannot hold, as the government requests, that Zito Towing is liable to the government for cleanup costs under section 1321(g). We are aware that Tri-Capt is insolvent and the government may not be able to collect on a judgment against it. However, we cannot use this as an excuse to distort the language or history of the statute.

3. *Prejudgment Interest*

The United States requests the Court to grant prejudgment interest on the amount recoverable under the statute from the date of its expenditure of funds, for cleanup of the oil spill on June 24, 1975. The defendants object to an award of prejudgment interest, but basically on the facts of the case. It is their position that shortly after the underlying collision occurred, on April 25, 1975, the private litigation was initiated. Prior to trial of the suit, in February 1977, the United States made informal claim on the private litigants for cost of removal of the oil spill. Because the government was informed of the pending collision litigation and also was requested to intervene in it to present its claim and chose not to, the defendants feel that it should not be entitled to prejudgment interest at this time. It is argued that the government waited until January 10, 1978, almost a year after trial on the collision litigation then pending and three years after the actual collision and oil cleanup activity, to bring suit. Defendants take the position that since the government caused the delay between its expenditure of funds and the judgment in this litigation, interest should be allowed only from the date of this Court's judgment.

There is no question that, pursuant to 28 U.S.C. §1961, the United States is entitled to interest on its judgment. However, this applies only to interest on the judgment itself and leaves open the question of granting prejudgment interest as part of the compensation to be awarded the government. *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966). Two courts have dealt with this question. In *United States v. M/V Zoe Colocotroni*, 602 F.2d 12, 14 (1st Cir. 1979), also an action by the United States to recover the cost of oil spill cleanup,

the court held that the question of prejudgment interest on the government's unliquidated claim lay in its discretion and approved the award of prejudgment interest from the date the United States first presented a bill to defendants. Its decision was based on general principles of admiralty law. The court in *United States v. Malitovsky Cooperage Co.*, 472 F.Supp. 454 (W.D.Pa. 1979), also held that it had discretion as to whether to award prejudgment interest on an award to the government to cover the cost incurred in a cleanup operation. As in the *M/V Zoe Colocotroni* case, supra, this court awarded prejudgment interest from the date the Coast Guard made its demand on the defendant for payment of the bill for cleanup costs. However, the oil spill in the latter case occurred on land, oil having emanated from a steel drum-reconditioning plant. Although the court was confronted with the same statute, 33 U.S.C. §1321, it did not rely on principles of admiralty law to reach its decision. It relied on general principles of federal law, which, however, also rests the determination of awards of interest on unliquidated claims in the discretion of the court. On either basis the same conclusion was reached. Having found that Tri-Capt is solely liable to the government for the cost of cleaning up the oil spill which it caused, we are now left with a determination of this question of prejudgment interest. Agreeing that it is within our sound discretion, we also think that interest should be paid by Tri-Capt from the date claim was made on it by the United States in February of 1977, without making them responsible for the time lapse between the government's expenditure and its request for reimbursement. Also on the authority of both cited cases, *United States v. M/V Zoe Colocotroni*, supra at 14, and supra at 458, we award this interest at the legal rate prevailing in Louisiana, as requested by the United States.

Finally, the United States seeks to recover against Tri-Capt's liability for the penalty assessed against it by the Coast Guard under 46 U.S.C. §405, which has been previously described. We agree that Tri-Capt, Inc., is liable to the United States in the amount of $500 for violation of this statute. Accordingly,

IT IS THE ORDER OF THE COURT that there be judgment in favor of plaintiff United States of America against defendant Tri-Capt, Inc., under the Federal Water Pollution Control Act, 33 U.S.C. §1321, for $15,500, plus 7% interest from February, 1977, until paid.

IT IS THE FURTHER ORDER OF THE COURT that there be judgment in favor of plaintiff United States of America against defendant Tri-Capt, Inc., in the sum of $500, representing the penalty for violation of 46 U.S.C. §405.

IT IS THE FURTHER ORDER OF THE COURT that there be judgment in favor of defendants M/V BIG SAM and Zito Towing, Inc., and against the plaintiff United States of America, DISMISSING the plaintiff's suit against them.